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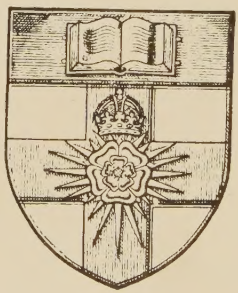

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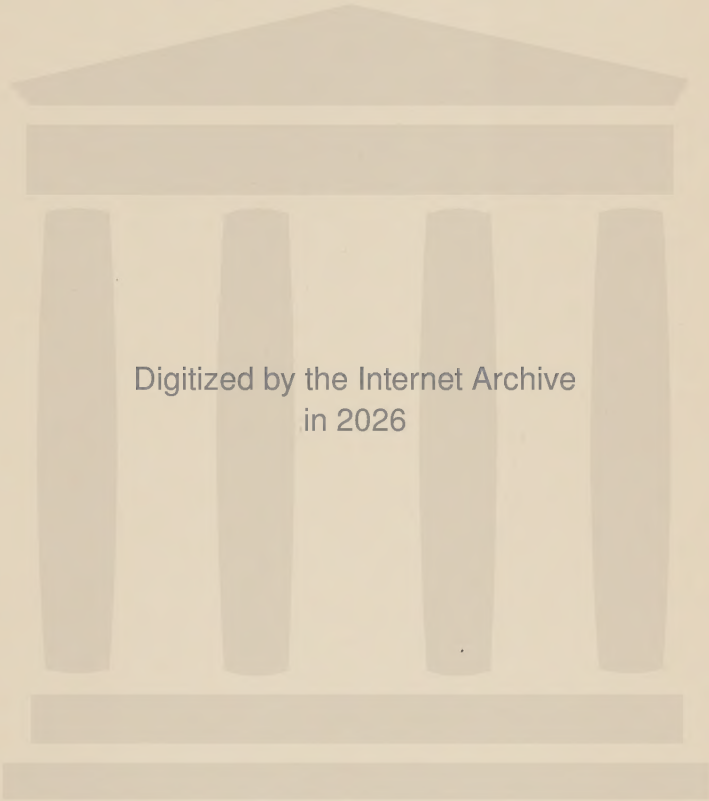
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1927.

Feb. 2. *The dignity of a Viscount of the United Kingdom was conferred upon the* RIGHT HON. JOHN ANDREW, BARON SUMNER, G.C.B., *a Lord of Appeal in Ordinary, by the name, style and title of Viscount Sumner, of Ibstone, in the County of Buckingham.*

July 8. THE HON. SIR HUGH FRASER, KNIGHT, *a Justice of His Majesty's High Court of Justice, King's Bench Division, died suddenly this day at Judges' House, Manchester, aged* 67.

Sept. 4. BERNARD JOHN SEYMOUR, BARON COLERIDGE, *formerly a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at the Chanter's House, Ottery St. Mary, aged* 76.

Oct. 12. THE HON. SIR FREDERICK ARTHUR GREER, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal, in the place of the Right Hon. Sir John Eldon Bankes, resigned.*

Nov. 3. *This day* SIR FREDERICK ARTHUR GREER, *Lord Justice of Appeal, was sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

ERRATA.

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556	,, (3)	22 Q. B. D. 631	[1902] 2 K. B. 631

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

CUNARD STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BUERGER . . . . . RESPONDENT.

H. L. (E.)* 1926 *June* 21.

Ship—Bill of Lading—Exceptions protecting Shipowners—Alteration of Destination by Agreement—Continuation of Bill of Lading—Deviation—Loss of Goods—Liability of Shipowners.

The plaintiff shipped eight bales of cloth, each above the value of 20*l.*, for carriage by a steamer belonging to the defendant company from London to Odessa under a bill of lading which excepted liability on the part of the company for goods above the value of 20*l.* per package, unless the value was therein declared and extra freight paid. The plaintiff did not declare the value of the goods or pay the extra freight. The bill of lading (clause 2) reserved to the company liberty for the steamer, before or after proceeding towards her port of discharge, to proceed to any port or ports whatsoever, although in a contrary direction, in any order, for any purpose whatsoever, and such ports were to be

* *Present:* LORD SUMNER, LORD PARMOOR, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

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deemed included in the intended voyage, and it provided (clause 4) that in case the whole or part of the goods specified therein were not from any cause, including negligence on the part of the company's servants, found for delivery, or it was inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination, the company was only bound to forward them to the port of destination from any subsequent port by any other steamer, either belonging to the company or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but at the merchant's risk. The contemplated voyage was to Constantinople and thence to the Black Sea ports, including Odessa. On the arrival of the ship at Constantinople in April, 1919, it appeared that Odessa was likely to be captured forthwith by the Soviet forces, and accordingly it was agreed between the respective agents of the plaintiff and the defendant company that the destination of five of the bales should be changed from Odessa to Batoum and that the remaining three should be discharged at Constantinople, either then or on the ship's return voyage. They were not then discharged, and the ship proceeded to Batoum and back by Novorossisk to Constantinople. The five bales consigned to Batoum remained on board after the ship had left that port. The three which were to have been brought back to Constantinople were landed at Novorossisk for no explained reason and were detained by the defendant company's agents for two months. Neither the five bales nor the three bales had since been heard of.

In an action by the plaintiff for non-delivery of the goods :—

Held, that the terms of the original bill of lading applied to the carriage to the substituted destinations, but that in the absence of special protective provisions in the bill of lading, the overcarriage of the five bales and the landing and detention of the three bales at Novorossisk constituted a deviation from the contract of carriage so as to deprive the defendant company of the benefit of the exceptions in the bill of lading; and that in the circumstances neither clause 2 nor clause 4 afforded any protection to the company.

Decision of the Court of Appeal [1925] 2 K. B. 646 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J. at the trial of the action.

The action was brought by the respondent, trading as Elias Büerger and Co., against the appellants for damages for the loss of eight cases of cloth shipped by the respondent to Odessa on the appellants' steamship *Verentia* and certain expenses incurred by the respondent with the appellants in connection with such shipment.

Rowlatt J. held that the appellants were protected from liability by the terms of the bill of lading and accordingly

(1) [1925] 2 K. B. 646.

gave judgment for the appellants, except as to a small item paid by the respondent for landing charges, as to which he gave judgment for the respondent.

The Court of Appeal (Pollock M.R., Atkin and Sargant L.JJ.), on the contrary, were of opinion that the appellants, having themselves materially departed from the contract terms and the contract voyage, could not rely upon the exceptions and conditions of the contract as exempting them from liability.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Lord Sumner, and they are summarized in the headnote.

The arguments on the appeal were the same as those used in the Court below, and they sufficiently appear from the opinion of Lord Sumner.

1926. May 13, 14. *Jowitt K.C.* and *James Dickinson* for the appellants.

Sir John Simon K.C. and *van den Berg* for the respondent.

[The following authorities were referred to: Scrutton on Charterparties, 12th ed., p. 298; Carver's Carriage by Sea, 7th ed., p. 426, § 287; *Davis* v. *Garrett* (1); *Smackman* v. *General Steam Navigation Co.* (2); *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (3); *Bruce, Marriott & Co.* v. *Houlder Line* (4); *London and North Western Ry. Co.* v. *Neilson* (5); *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (6); *Internationale Guano en Superphosphaatwerken* v. *Robert Macandrew & Co.* (7)]

The House took time for consideration.

1926. June 21. LORD SUMNER. My Lords, this was an action by owners of cargo, now respondents, against voyage-charterers of the steamship *Verentia*, now appellants, for non-delivery of eight cases of textile goods. Except for a

(1) (1830) 6 Bing. 716.
(2) (1908) 13 Com. Cas. 196.
(3) [1908] 1 K. B. 796; [1908] 2 K. B. 626.
(4) [1917] 1 K. B. 72.
(5) [1922] 2 A. C. 263.
(6) [1907] 1 K. B. 660.
(7) [1909] 2 K. B. 360.

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small sum not now in dispute or material, Rowlatt J. decided in the appellants' favour, but in the Court of Appeal the cargo owners were held to be entitled to judgment for a large sum as the agreed value of the goods. The story of this adventure is curious.

The *Verentia* was, it is said, the first ship to pass the Dardanelles after the armistice with a large general cargo for Constantinople and Black Sea ports. The plaintiffs, enterprising and hopeful export merchants, had shipped by her for Odessa eight bulky cases, worth nearly 3000*l*., under one bill of lading, and they sent out a Mr. Macdonald to meet the ship and represent their interests with regard to this and other cargo. On reaching Constantinople at the end of April, 1919, he found that the *Verentia* had arrived there; that the French troops had evacuated or were just evacuating Odessa; and that accordingly the voyage to this port was to be abandoned. He was told by the appellants' agents that the ship would proceed to Batoum and Novorossisk and, partly on their advice, he decided that Batoum would be the best port to which to send five of the cases; the other three he sold to a Stambouli firm. A question has been raised as to the contract terms for the altered voyage—namely, whether the bill of lading voyage was put an end to by consent and such goods as went forward were carried under a fresh contract on the terms of a common carrier's liability and without the protection of bill of lading exceptions, or whether the arrangement made was simply to substitute other destinations for Odessa in the bill of lading, that document remaining otherwise in force. Both Courts below have found that the latter was the true arrangement, and with this I agree. Except by extreme inadvertence, I cannot imagine an arranged voyage of this kind being made without such terms, and it would require much stronger evidence than any that we have here to make such a case even plausible.

When Mr. Macdonald asked for immediate delivery at Constantinople of the three cases sold to the Stambouli firm, he was told that they were stowed underneath a great quantity of other cargo and that, if they could not be got at (as, in fact,

they were not) before the *Verentia* sailed, they must go the round of the ship's Black Sea ports of call and would then be delivered at Constantinople on her return. For the other five Batoum was agreed to be the destination.

Your Lordships have re-examined with much care the evidence, which was elaborately examined in the Court of Appeal, and I need not now review it in detail. At the trial, as is very usual, the whole of the correspondence, which was forthcoming, was by consent, along with sundry other documents, read as evidence of the truth of the statements contained in it without any objections as to admissibility, hearsay, and otherwise, and I think we are free to draw reasonable inferences from the facts thus appearing. The result is this. The *Verentia* reached Batoum without having parted with any of the cases. The five consigned to Batoum remained on board, when the ship left that port, and have never been heard of since. She did not bring them back to Constantinople and nothing is known of their fate. The three cases, which were to have been brought back to Constantinople, were landed at Novorossisk, her last port of call, no one knows why, but contrary to express instructions and without any evidence of necessity or even any attempt at an explanation. Two months afterwards they were still in the hands of the appellants' agents there, who wrote on August 31, 1919, that they would be forwarded to Constantinople by the next ship. Nothing more has been heard of them. Though much has been made of the indignant letters of Mr. Macdonald, according to which Batoum (and Constantinople too) must have been a den of thieves, and much also of the gradual advance of the Soviet forces, which eventually reached Novorossisk, it is noticeable that no proof of actual capture, seizure, theft or pillage of these cases has been offered, and the appellants' agents felt themselves so unable to affirm any of these things as facts, that they refused, and properly so, to certify to that effect in order to assist a claim upon underwriters.

The present action was not begun till April, 1924. To the plaintiffs' claim for non-delivery the defence was raised that

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by the bill of lading, the defendants were not to be accountable for any goods which were above the value of 20*l.* per package, unless the value was expressed in the bill of lading and extra freight paid, a precaution which, rather short-sightedly, the plaintiffs had not taken. This was met by a plea of deviation in reply, and, on the request of the defendants' solicitors, a letter was written by the solicitors acting for the plaintiffs, which stated, as particulars of this plea, that the deviation consisted in the carriage of three bales of cloth past their destination, Constantinople, and of five bales of cloth past their destination, Batoum.

An objection has been raised on these particulars which I must explain, so that it can then be briefly disposed of. It is a mistake to say, as was said in argument, that the Court of Appeal found that mere misdelivery had occurred, and then treated misdelivery as equivalent to a deviation. Lord Hanworth M.R. and Sargant L.J. came to the conclusion that the three cases were not landed at Novorossisk for any temporary purpose but as goods reaching their destination, and that no resumption of the transit was intended. Atkin L.J. dwelt on the fact that they were left there for at least eight weeks, as being such a delay in the course of their agreed transit as would support the plaintiffs' reply. Put into technical language the first view is that there was an abandonment of the voyage, on which these three cases were adventured, and the second is that there was such unreasonable delay in forwarding them as constituted a deviation, to say nothing of abandonment of its further continuance. The appellants' counsel drew attention to the fact that the particulars above mentioned referred neither to delay amounting to deviation nor to total abandonment of the transit, and objected to the admission of such contentions on the ground that, if they had been raised on the pleadings, evidence in rebuttal might have been obtained.

My Lords, I think that this objection ought not to prevail. I am satisfied that no further evidence could have been got. The singular feature about this case is that, either because

they did not choose to seek it or because they found that they could not get it, the appellants' Constantinople agents throughout produced no evidence of the fate of these goods. They met complaints by evasion and, when they made inquiries of the other agents, received only evasive replies. The course of post continued between Constantinople and Novorossisk, though probably it was subject to delays. Emissaries were sent to Novorossisk and Batoum to try to trace these and other goods, but nothing came of it. The whole eight packages were only a matter of six tons weight. It is useless to say that no means of forwarding such a parcel were available. We know that there was a mail and passenger service, and the Novorossisk agents evidently treated it as a fairly frequent one. I decline to believe that any credible evidence could have been found to account for the delay on the ground that all means of conveyance failed, or to modify the inference, that any further transit to Constantinople had long been given up.

In the next place it is clear that these particulars were, even at the trial itself, tacitly treated as insufficient, and were largely laid on one side. Rowlatt J. had before him, apparently without objection, the evidence that the three cases went on to Batoum and Novorossisk with Mr. Macdonald's consent and on the terms that they should come back to Constantinople and be discharged there on the ship's return, yet on the bare language of the particulars this was new matter and was outside the pleaded deviation, consisting in any carriage of the three cases past their destination, Constantinople, at all.

Thirdly, this is at most only a matter of amendment, and I think that, in their discretion, the Court of Appeal virtually allowed any amendment necessary. After all deviation by delay and abandonment of the voyage, so far from being new, arise obviously on the dates and on the face of the letters written by the appellants' agents. Some objection was taken by their counsel in the Court of Appeal, in what precise terms we do not know, but in spite of this all the members of the Court dealt with these matters as if they

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were properly open to the plaintiffs. I think that we cannot now exclude them.

In the absence of special provisions in the bill of lading the overcarriage of the five cases beyond Batoum and the landing of the three at Novorossisk, without reloading them on the *Verentia* at once or otherwise promptly forwarding them to their destination, would be a complete answer to the defence, that, for want of a declaration of the value of the cases, the appellants were not accountable. Each would constitute a fundamental departure from the course of the agreed transit, after which such a clause of exception would cease to apply. Of course, however, this bill of lading contains special provisions on the point, and the question is whether they suffice for the appellants' protection under the circumstances.

The first and principal clause is No. 2, where a formula is elaborated, strongly reminiscent of *Glynn* v. *Margetson & Co.* (1) and other familiar cases on liberties to deviate. The words are: "The company reserves . . . . liberty for the steamer . . . . before or after proceeding towards her port of discharge, to proceed to and stay at any port or ports wheresoever, although in a contrary direction . . . . once or oftener, in any order backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and all such ports, places and sailings shall be deemed included in the said intended voyage, although in doing so the vessel may be altogether departing from the customary or advertised route from the port of shipment to the port of discharge, or may be making in substance another and different voyage or voyages."

For any particular parcel of goods "her port of discharge" means the port at which the ship is to discharge those goods, though she may have a comprehensive itinerary to perform afterwards. The acts complained of with regard to the five cases—namely, the overcarrying beyond Batoum, were not done "before or after proceeding towards her port of discharge," but after leaving it. As to the three cases, which

(1) [1893] A. C. 351.

she landed before proceeding towards her port of discharge for them, that is Constantinople, the best words to be found in clause 2 are these: "reserves liberty to land and store, for such time as may be deemed expedient and thence to reship." Now the landing of these three cases (we do not know if there was any storing or not) was a landing once and for all, not followed by any reshipment and not explained by any evidence to show why there was no reshipment, but effected, as a matter of fair inference, without any real intention of reshipping them at all. Clause 2 accordingly affords no answer to the alleged deviation.

There are some further casual references to deviation in clause 5, which clearly do not apply. The chief reliance is, however, placed on the following passage in clause 4: "In case the whole or any part of the goods specified herein are not from any cause, including negligence on the part of the company's servants, found for delivery, or it is inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination, the company is only bound to forward them to such port of destination from any subsequent port by any other steamer or steamers . . . . either belonging to the company, or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but the merchant's risk in every respect, and the company shall be under no further responsibility."

My Lords, I think that upon two grounds this clause is of no avail. Firstly, it applies only in specified circumstances, which are not proved to have occurred, and it does not expressly reserve to the company the right to act under these words without the consequent overcarriage of goods being deemed to be a deviation. In a clause, framed so arbitrarily in the company's favour, this further and equally arbitrary term cannot be implied.

In the second place the burden is, in any case, on the appellants to prove that the events occurred which would bring this protective clause into operation, however we construe it. Neither Rowlatt J. nor the Court of Appeal

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found this issue in the appellants' favour. It would require clear evidence indeed before your Lordships would consent to do so now for the first time. The evidence is this and no more. A letter is produced from the appellants' agents at Batoum, dated two days before the ship sailed, which informs the captain that five parcels of goods, loaded from Constantinople for Batoum, are missing, and among these occurs "P. K. & Co., five cases of cloth." The mark on the cases in question was really P. & Co. but, as the manifest contains no entry of goods marked P. K. & Co., it is suggested that P. K. & Co. is an inexact reference to the goods marked P. & Co. The letter concludes by asking the captain to "take the necessary measures to find same, if possible." There the whole proof stops. There is no evidence at all that it was inconvenient for the ship's purposes to make delivery, nor is there any that the goods were not found for delivery, nor do these two expressions between them necessarily exhaust all the possibilities of such a situation. The goods may have been found and forgotten again. Accordingly it is not self-evident that the words of the clause must have been satisfied, and it is not proved that events happened to which this clause would apply. So much for the facts. Further, on construction the clause itself is framed so as to define the limits of the obligation, falling on the company in the named event, with regard to sending the goods back to their port of destination from a subsequent port. As to the company's liability the terms are that the carriage back is to be at the company's expense but the merchant's risk. Thus the limited liability provided is in respect only of transit from the subsequent port to the port of original destination. During the overcarriage between that original port and the subsequent port nothing is stipulated, and the liability of the company must, therefore, be such as the general law imposes, that is, that during this deviation by overcarriage the protection of the 20*l.* clause does not apply. To eke out the company's reservations of liberties by implying the reservation of a right to extend the contracted voyage beyond the original port of destination

to the subsequent port, so as to prevent a deviation, is too much to be allowed contra proferentes, nor is an ambiguous clause, for such it is at best as regards this overcarriage, any protection to them. The bill of lading accordingly leaves the appellants without answer both as to the delay in and the ultimate abandonment of the transit of the three cases, as well as to the overcarriage of the five. I move your Lordships to dismiss the appeal with costs.

My Lords, I am requested to state that my noble and learned friend Lord Carson concurs in the motion which I have proposed and in the reasons which I have just given.

LORD PARMOOR. My Lords, the appellants are shipowners and at all material times the steamship *Verentia* was running under charter in their line. The respondent consigned eight cases of cloth in the *Verentia* which, at that time, was intended to sail to Odessa, under the terms of a bill of lading dated March 24, 1919. During April it became evident that the steamship *Verentia* could not safely proceed to Odessa. In consequence an arrangement was made at Constantinople under which Batoum was substituted as the port of destination for five of the cases of cloth and Constantinople was substituted as the port of destination for three of the cases of cloth either on the outward or return voyage. In all other respects the bill of lading was not altered, and, so far as it was applicable, covered the carriage both of the five cases and of the three cases of cloth.

The bill of lading contained a clause under which the appellants became not accountable for any goods of whatever description which are above the value of 20*l.* per package, unless the value be expressed in the bill of lading and extra freight agreed on and paid. The cases of cloth did exceed 20*l.* in value, but the value thereof was not expressed in the bill of lading and no extra freight was agreed on or paid. If this clause covers the goods conveyed by the appellants, at the time and under the conditions when the loss occurred, then the appellants would succeed in this appeal. It has, however, been held by the Court of Appeal that the appellants

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are not protected by the said clause and that the eight cases of cloth were lost under conditions such that the terms of the bill of lading did not apply, and that in substance the appellants were liable to the ordinary liabilities of a common carrier. If the appellants are liable, outside the terms of the bill of lading, the amount of damages has been agreed between the parties.

It will be convenient to consider, in the first place, the relevant facts in reference to the five cases of cloth of which the port of destination was Batoum. It is difficult to form an exact conclusion, but there is sufficient evidence to support the case of the respondent, in the absence of any explanation on behalf of the appellants. At one time the respondent asked for a certificate from the appellants that the cases of cloth had been stolen in order to recover against the underwriters, but such certificate was not given, and on May 23, 1921, the appellants write: "At present we have been unable to obtain any definite evidence that these goods were stolen. Such evidence as we have is to the contrary effect, as we are informed that three of the cases were actually discharged at Novorossisk."

There is evidence that the five cases of cloth were not discharged at Constantinople on the outward journey. Only two days before the ship left Constantinople on her outward voyage, on May 17, 1919, the agent of the respondent wrote to the agent of the appellants: "It is also understood that three cases of cloth will be discharged here and the remaining five cases in Batoum." The accuracy of this quotation was not questioned. The ship on leaving Constantinople sailed to Constanza, stayed at Constanza from May 18 to 20, and reached Batoum May 23, staying there until June 13. There is no suggestion that the five cases of cloth were discharged at Constanza. On June 30 the agent of the respondent wrote to the agent of the appellants at Batoum: "We have your letter of to-day's date stating that this parcel (the five cases of cloth) has not been discharged." The accuracy of this quotation was not challenged by the appellants, and, on the evidence generally, I come to the

same conclusion as Atkin L.J., that the five cases of cloth were in fact carried beyond Batoum, and that this is sufficient to establish the liability of the appellants.

It is a well established principle, that stipulations in a contract of carriage, limiting or negativing the liability of carriers, by land or water, for loss or damage to goods entrusted to them for carriage, do not apply when such loss or damage has occurred outside the route or voyage contemplated by the parties when they entered into the contract of carriage, unless the intention that such limitations should apply is expressed in clear and unambiguous language. The counsel for the appellants argued that the limitations of liability contained in the bill of lading did apply to the carriage of the five cases of cloth beyond Batoum, and that such carriage was within the route and voyage contemplated when the bill of lading was signed. They relied upon clauses 2, 4 and 5 of the bill of lading in support of their case. No doubt clause 2 of the bill of lading gives a wide power of deviation between the port of shipment and the port of destination, but there is no suggestion that the steamship *Verentia* after leaving Batoum would return again to that port as the port of destination for the discharge of the five cases of cloth. In other words, when the steamship *Verentia* left Batoum, it was not a deviation in the course of the agreed voyage between the port of shipment and the port of destination, but the start of a new voyage after the agreed voyage had been finally determined. As to clause 4 of the bill of lading, there is no evidence on behalf of the appellants that the whole or any number of the five cases of cloth were not from any cause, including negligence on the part of the servants of the appellants, not found for delivery at Batoum or that it was inconvenient for the ship's purposes to deliver during the *Verentia's* stay at their port of destination. Clause 5 might have applied to the port of Odessa but is not applicable to the port of Batoum, where the steamship *Verentia* stayed from May 22 to June 13. In the result I agree with Atkin L.J. that the five cases of cloth were carried beyond Batoum, and that this constituted a deviation from the route contemplated

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in the contract of carriage, such that the limitation of liability to an amount of 20*l.* per package unless the value be expressed in the bill of lading and extra freight agreed on and paid has no application.

The three cases of cloth were carried on the agreed voyage down to the time of their arrival at Novorossisk. At Novorossisk they were not temporarily put on shore, but were detained by the agents of the appellants as goods reaching their destination. This is sufficient to constitute a deviation from the contract of carriage, such that the conditions and exceptions contained in the bill of lading limiting the liability of the appellants have no application.

In my opinion the appeal should be dismissed with costs.

LORD PHILLIMORE (read by LORD BLANESBURGH). My Lords, upon the whole I think that your Lordships should agree with the conclusion of the Court of Appeal that the five cases of draperies were not landed at Batoum but were carried forward.

If this be so, the contract of carriage had, as far as they were concerned, terminated, and the special conditions of the bill of lading no longer remained to protect the Cunard Co., unless the company can avail itself of the provision in the bill of lading to the following effect: "In case the whole or any part of the goods specified herein are not from any cause, including negligence on the part of the company's servants, found for delivery, or it is inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination; the company is only bound to forward them to such port of destination from any subsequent port by any other steamer or steamers, ship or ships, either belonging to the company, or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but the merchant's risk in every respect, and the company shall be under no further responsibility."

My Lords, I should not be disinclined to hold that these goods were not "found for delivery" within the meaning of this clause; but this does not much help the company,

because there is a failure of all proof as to what happened to them afterwards. They were probably landed at Poti or at Novorossisk, but whether for the purposes of being forwarded in compliance with the terms of the bill of lading or otherwise we do not know. At any rate by the time the writ in this action was issued ($3\frac{1}{2}$ years later) they had not been forwarded; and this unreasonable delay amounts to a deviation and puts the parties outside the contract contained in the bill of lading and leaves the Cunard Co. unprotected.

As to the three cases, we know that instead of being brought on to Constantinople they were landed at Novorossisk, and that when last heard of they were in the custody of agents of the Cunard Co., holding them apparently for the Cunard Co. This being so, the same long delay in forwarding (for which it is possible there was some excuse but for which no excuse is proved in evidence) amounts to a deviation.

Therefore it seems to me that the judgment of the Court of Appeal was right.

LORD BLANESBURGH. My Lords, I had before this morning the advantage of reading the judgment which my noble and learned friend on the Woolsack has just delivered. I entirely concur in it.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 21, 1926.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondent: *Cosmo Cran & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 July 8.

OWNERS OF STEAMSHIP SINGLETON ABBEY . . . . . } Appellants;

AND

OWNERS OF STEAMSHIP PALUDINA Respondents.

THE PALUDINA.

Shipping—Collision—Consequential Damage—Second Collision—Novus actus interveniens—Alternative Danger—Contributory Negligence.

On the morning of November 22, 1922, the *Paludina*, the *Singleton Abbey*, and the *Sara* were moored by their sterns to the quay in Valetta Harbour, Malta, in the order named from east to west, and the vessels had their anchors down forward. There was a strong wind blowing from E.N.E. and there was a swell in the harbour. At 8 A.M. the *Paludina* dragged her anchors and the fore part of the vessel fell down upon the *Singleton Abbey* and remained in contact with her. In endeavouring to get free from the *Singleton Abbey* the *Paludina* broke away from her moorings and fell bodily upon the *Singleton Abbey* and parted her moorings, and the *Singleton Abbey* in turn fell down upon the *Sara* and cast her adrift. The *Singleton Abbey* and the *Sara* then manœuvred in the harbour under their own steam to keep away from the shore and brought up heading to the wind. Twenty minutes later the *Sara* got under the starboard quarter of the *Singleton Abbey*, when the revolving propeller of the *Singleton Abbey* struck the *Sara*, with the result that the *Sara* was sunk and the propeller was damaged. The *Paludina* was clear of both ships at the time. In an action by the *Singleton Abbey* against the *Paludina*, there being no appeal from the decision of the President that the *Paludina* was liable for the earlier collisions, the only question now at issue was whether she was also liable for the final collision between the *Singleton Abbey* and the *Sara*. The President, acting on the advice of two of the Elder Brethren of the Trinity House, found that the final collision was directly caused by the negligence of the *Paludina*, but his decision was reversed on appeal. The nautical assessors in the Court of Appeal advised (1.), agreeing with the Elder Brethren, that there was no fault on the part of the *Sara*, and (2.), differing from the Elder Brethren, that the master of the *Singleton Abbey* was guilty of want of reasonable care in not stopping his engines in time to avert the collision:—

Held (by Lord Sumner, Lord Carson, and Lord Blanesburgh; Viscount Dunedin and Lord Phillimore dissenting), that the final collision was not directly caused by the negligence of the *Paludina*, but that the action of the *Sara* constituted a novus actus interveniens, the *Singleton*

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* *Present:* Viscount Dunedin, Lord Sumner, Lord Phillimore, Lord Carson, and Lord Blanesburgh.

Abbey having failed to prove that the *Sara*, in acting as she did, was free from blame.

Per Lord Sumner. The miscalculation of the master of the *Singleton Abbey* in not stopping his engines sooner also broke the chain of causation.

Collins v. *Middle Level Commissioners* (1869) L. R. 4 C. P. 279 considered.

The City of Lincoln (1889) 15 P. D. 15 distinguished.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a decree of the President of the Probate, Divorce and Admiralty Division.

The action was brought by the appellants against the respondents in respect of four collisions in which the appellants' steamship the *Singleton Abbey* sustained damage—namely, two collisions between the *Singleton Abbey* and the respondents' steamship *Paludina* and two collisions between the *Singleton Abbey* and the steamship *Sara*.

The President, acting on the advice of two Elder Brethren of the Trinity House, held that all four collisions were caused by the negligence of the *Paludina*. On an appeal to the Court of Appeal in respect of the second collision between the *Singleton Abbey* and the *Sara*, the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), acting on the advice of their nautical assessors, held that the *Paludina* was not to blame for that collision.

The facts are fully stated in the opinion of Viscount Dunedin, and are summarized in the headnote.

1926. April 20, 22, 23. *Sir John Simon K.C.* (with him *Dunlop K.C.* and *Lewis Noad*) for the appellants. The initial cause of this series of accidents was the negligent management of the *Paludina*, and there has been nothing in the management of either the *Sara* or the *Singleton Abbey* to break the chain of causation. There have been concurrent findings by the President and the Court of Appeal that there was no negligence on the part of the *Sara*, and the President was right in finding that there was no negligence on the part of the *Singleton Abbey*. The advice of the Trinity Masters to that effect was right, and the opinion of the assessors in the Court of Appeal to the contrary

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was erroneous, and was based upon a view of the facts different from that found by the President. The master of the *Singleton Abbey* had been placed by the negligence of the *Paludina* in a serious dilemma. He had to keep his engines going till the last moment to prevent being driven ashore, and that danger was increased by his being driven broadside on by the action of the *Sara*, and he had to avoid colliding with the *Sara*. If in these circumstances he left his engines going a little too long, that does not constitute negligence on his part. A man who by another's want of care finds himself in a position of imminent danger cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. Still less can the party whose fault brought on the risk be heard to complain of the other's error of judgment. This rule is specially applicable to maritime cases where a ship placed in peril by another's improper navigation has at the last moment taken a wrong course: Pollock on Torts, 12th ed., p. 482; *The City of Lincoln*. (1) As to novus actus interveniens the earlier of two events does not necessarily lose its character by the interposition of a subsequent event between it and the accident: *Engelhart* v. *Farrant & Co*. (2); *McDowall* v. *Great Western Ry. Co*. (3) The Court of Appeal ought not to have left the question whether the master of the *Singleton Abbey* was guilty of negligence to the assessors. That was a question which the Court should have decided for itself. As has been stated by Lord Birkenhead in *Owners of S.S. Melanie* v. *Owners of S.S. San Onofre* (4), an appeal from assessors to assessors is intolerable. It would appear from Lord Birkenhead's opinion that he regarded the part played by the Elder Brethren in a Court of first instance as a greater part than that played by assessors in an appeal tribunal.

[As to the functions of Trinity Masters and nautical assessors counsel referred to *The Hannibal* (5); Roscoe's Admiralty Practice, 4th ed., p. 5, note (*k*); p. 360, note to Order XXXVI.,

(1) 15 P. D. 15.
(2) [1897] 1 Q. B. 240.
(3) [1903] 2 K. B. 331.
(4) [1919] W. N. 151; reported, post, p. 162n.
(5) (1867) L. R. 2 A. & E. 53, 56n.

r. 43; *Dale* v. *Hall* (1); *Stoker* v. *Hutton* (2); *S.S. Gannet* v *S.S. Algoa* (3); *The Beryl* (4); *The Magna Charta* (5); *The Aid* (6); *The City of Berlin* (7); *The Koning Willem II.* (8)]

Butler Aspinall K.C. and *Stephens K.C.* (*Langton K.C.* with them) for the respondents. The respondents concede that the question whether there was negligence on the part of the *Singleton Abbey* was not a peculiarly nautical point and was not a matter requiring the advice of the nautical assessors, but the Lords Justices were careful to say that the advice which they had received presented the true view; they exercised their own judgment on the question. To say that the opinion of the Elder Brethren is sacrosanct is putting the matter far too high. *Engelhart* v. *Farrant & Co.* (9) and *McDowall* v. *Great Western Ry. Co.* (10), which the appellants cited to show that there was here no novus actus interveniens, are dealt with by Lord Sumner in *Weld-Blundell* v. *Stephens.* (11) In *The City of Lincoln* (12) the plaintiff vessel was throughout in the strangle hold of the collision. She had lost the means of navigating; she was blinded; and, assuming that the Court of Appeal were right in their facts, there was no difficulty in holding that the total loss was directly traceable to the negligence of the wrong-doing ship. There is here no question of disputed law; the question is as to applying the law to the particular facts. In the respondents' submission (1.) there was negligence on the part of the *Singleton Abbey* in failing to stop her engines at the proper time, and (2.) there was negligence in the management of the *Sara* in letting her get so close alongside the *Singleton Abbey*. If there was an error of judgment on the part of either of these ships and they were free agents that is sufficient to break the chain of causation. There was no question of the agony of the collision in this case. If it is not shown how the *Sara*

(1) (1763) Admlty. Cases (Marsden), p. 323.
(2) (1785) Admlty. Cases (Marsden), p. 328.
(3) [1900] A. C. 234, 235.
(4) (1884) 9 P. D. 137, 141.
(5) (1871) 1 Asp. M. L. C. 153, 154.
(6) (1881) 6 P. D. 84, 86.
(7) [1908] P. 110, 118.
(8) [1908] P. 125, 137.
(9) [1897] 1 Q. B. 240.
(10) [1903] 2 K. B. 331.
(11) [1920] A. C. 956, 989.
(12) 15 P. D. 15.

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came into collision it is for the plaintiffs to make out their case by proving that the *Sara* was not at fault, and this they have failed to do. In any of these events the plaintiffs cannot establish that the final collision was the direct consequence of the *Paludina's* negligence.

[LORD SUMNER referred to *Hill* v. *New River Co.* (1)]

Sir John Simon K.C. in reply referred to *Byrne* v. *Wilson.* (2)

The House took time for consideration.

1926. July 8. VISCOUNT DUNEDIN. My Lords, there is only one question in this appeal, but in order to make that question intelligible it is necessary to tell the story of the circumstances antecedent to the incident which raises the question. As to these preliminary circumstances there were at one time controversies, but these controversies have been quieted by the decision in which the learned President and the Court of Appeal have agreed. The question that remains is alone the point of difference.

On the evening of November 21, 1922, the following vessels took up their position on the quay in the harbour of Valetta, Malta. Their sterns were secured by moorings attached to bollards on the quay; their stems were secured by anchors. Beginning from left to right as a person standing on the quay would see them they were: the *Paludina*, the respondents' steamship; the *Singleton Abbey*, the appellants', the *Sara*, and then other vessels which do not come into the story. During the night the wind freshened and became very strong —not exactly what by seamen would be called a gale, but causing a commotion of waves and what is termed a "scud" in the harbour. The direction of the wind was such as would blow the vessels, supposing them to be free, along the quay and on to a lee shore. At 8 A.M. something went wrong with the moorings of the *Paludina*. Her anchors dragged and her moorings to the stern paid out, and she fell with her starboard beam on the port beam of the *Singleton Abbey*. The effect of the actual collision was not serious; the *Singleton Abbey* had been securely moored, and she was able not only

(1) (1868) 9 B. & S. 303. (2) (1862) 15 Ir. C. L. R. 332, 339, 340.

to maintain her own position but to support the weight of the *Paludina* leaning against her. At 11 A.M., or thereby, the *Paludina* was minded to get out. For that purpose she secured the services of two tugs and got up steam to proceed to go forward. Unfortunately she and the tugs between them made a very bad job of the proceeding; one of the tugs fouled her own propeller with a rope and probably became inefficient; at any rate, the result was that the *Paludina* scraped along the port side of the *Singleton Abbey* without doing much damage, and then getting past her stem trod on the ropes which secured the *Singleton Abbey* to her anchors, shortened them and tore the *Singleton Abbey* away from her shore moorings. The *Paludina* then lumbered out of the way, but remained immediately in proximity to the *Singleton Abbey*, and did not finally get off for some time, in the course of her eventual progress fouling another ship. The effect of the tearing away of the shore moorings of the *Singleton Abbey* was that she fell down on her next neighbour, the *Sara*. The *Sara* was a small boat, and the impact of the *Singleton Abbey* tore her from her moorings. The actual collision did not do much damage. About twenty minutes passed, and then the *Sara*, which had got up steam and was struggling to get out, fell down from her anchors alongside the *Singleton Abbey*. The *Singleton Abbey* all this time was using her engines to prevent herself being driven on the lee shore. The *Sara* scraped along her side, and as she passed came into contact with the propeller of the *Singleton Abbey*, damaging it by breaking off the points. The propeller avenged itself, for it cut such a hole in the *Sara* that she shortly thereafter sank.

The present action was raised by the *Singleton Abbey* against the *Paludina*. The *Paludina* made several defences, such as that the *Singleton Abbey*, having come in after her, had given her a foul berth, and also by denying that she had committed any fault in herself breaking away. All these defences were repelled by the learned President, and the Court of Appeal agreed with him. It is therefore no longer in dispute that the *Paludina* was in fault in breaking away

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from her moorings and causing the first collision with the *Singleton Abbey*, that she was also in fault in treading on the moorings of the *Singleton Abbey* and tearing her from her shore moorings and sending her down on the *Sara*, thus causing the second collision. The whole trouble is as to the third collision and the damage to the crew.

The learned President held this was the direct consequence of the act of the *Paludina* and held her liable. The Court of Appeal disagreed and held that that collision was not due to the original fault of the *Paludina* but was due to a novus actus interveniens. This is the question, and the only question, before your Lordships.

Now Bankes L.J. states the question very clearly and distinctly: "Here the case for the plaintiffs is this, the chain of causation is quite complete. The *Singleton Abbey* and the *Sara* were both turned adrift by the negligence of those in charge of the *Paludina*. There is no novus actus interveniens: the chain is quite complete, and, therefore, the view taken by the President is right. The suggestion for the defendants, upon the evidence given by the plaintiffs, is this: On your own showing there are two links wanting, and the links are these. True, the *Sara* was turned adrift by the negligence of the *Paludina*, our vessel, but, being turned adrift, she was a free agent. The inference to be drawn from the evidence is that her steam was up and she could have gone to any part of the harbour she liked, and have been quite safe, and altogether out of the way of the *Singleton Abbey*, and you cannot say that the chain of causation is complete when you find the *Sara* having this opportunity which, through a want of proper skill and proper seamanship, she did not avail herself of. That, I understand, is the case of the defendants with regard to the *Sara*. Then they say: There is another link in the chain missing, and the missing link is to be found—or the place where the link ought to be but is missing from—is found in the action of the master of the *Singleton Abbey*; because, again, after this interval he was in the position which I have indicated, and he had steam up; he saw, and had an opportunity for twenty minutes

of realizing, the position in which the *Sara* was. He realized that the *Sara* was coming down upon him; he was told by the second officer that the engines ought to be stopped. I had better use his own words about it; he was very frank about it. He was asked this question in cross-examination: 'The suggestion is made, as I understand it, that you ought to have stopped your engines, or rung them to stop, before you did, so as to avoid hitting the *Sara* with your propeller—what do you say with regard to that?—A. Well, I had to keep my engines going as long as I could because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little too late.' That is his own version of what happened. The defendants say that upon that there is a clear break in this chain. They say: The damage of which you complain, was not the result of the original negligence of our vessel, it was due to your captain's own fault. The plaintiffs answer that by saying: It ought not to be attributed to him as a fault; he was in a position of danger; it was a position in which you had placed him, and it ought not to be attributed to him as a fault or as an act of negligence, and, under those circumstances, the chain is complete. Now, on both these points upon which it is said the chain is not complete, of course the matter is one very largely of the right and proper thing to do under the particular circumstances; and that is a matter upon which we should naturally take the advice of our assessors. I have asked them the question as to whether, assuming that the *Sara* had steam up—and I assume that for the purposes of the question—were those in charge of the *Sara* guilty of a want of reasonable care and good seamanship in not keeping the *Sara* clear of the *Singleton Abbey?* They give a reasoned answer, and the result of their reasoning is that they say 'No' to that. So whether the issue is upon the plaintiffs or the defendants is immaterial. It seems to me that the suggested break in the chain does not exist."

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Now that is perfectly distinct, and Scrutton L.J. as to this agrees with him. It is true that Atkin L.J. scarcely takes the same view. He states that he cannot see why the *Sara* should have come into contact with the propeller blades of the *Singleton Abbey* at all.

My Lords, it seems to me that it is absolutely necessary to make up one's mind as to the first question before one considers the second, and one's mind must be made up yea or nay; it cannot be left as a question in abeyance. Now, I take it that the reason why the President, Bankes and Scrutton L.JJ., and both sets of assessors agreed that the action of the *Sara* was not novus actus interveniens was this: she was set adrift by the wrongful action of the *Paludina*, who knocked the *Singleton Abbey* against her. The argument for the *Paludina* was that she was after that a free agent, but that is not so. She was free in the sense of being unmoored, but she was still struggling to extricate herself from the position—a very dangerous one—in which the *Paludina* had put her, and as soon as you come to the conclusion, as all these learned persons did, that there was no fault on the part of the *Sara* in doing as she did, the result is inevitably that the chain of causation from the original fault remains unbroken.

Now, having fixed that, and, as I say, being bound to fix it yea or nay, immediately we come to the last question. Here I quote again from Bankes L.J.; and Scrutton L.J. with doubts, and Atkin L.J. without doubts agree with him. The assessors also agree with the learned Lord Justices: "The other question is one, again, upon which we asked their opinion. It was this: Under the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? And their answer is Yes. After having heard the arguments of Mr. Dunlop and Mr. Noad upon the point, in that opinion, so far as I am able to give an opinion, I entirely concur."

Now as regards the assessors, who in this matter differed

from the assessors of the President, your Lordships have agreed with me that it was not a question for assessors at all, and consequently we did not consult our assessors on the subject. My Lords, it seems to me that once you have fixed that the action of the *Sara* in coming down on the *Singleton Abbey* was not due to fault of her own but was therefore necessarily the sequel of the original wrongful action of the *Paludina*, the question which arises on the action of the *Singleton Abbey* is rather shifted from the domain of novus actus interveniens to that of contributory negligence. It is just the same as if the *Paludina* herself had come down along the side of the *Singleton Abbey*. Now here there is ample authority. I will take one of the latest and most authoritative, the judgment of Birkenhead L.C. in *The Volute*. (1) The learned Lord says this: "At the other end of the chain A's negligence makes collision so threatening that though by the appropriate measure B could avoid it, B has not really time to think and by mistake takes the wrong measure. B is not held guilty of any negligence and A wholly fails."

Now here, if I am right so far, the position of danger occasioned by the *Sara* coming down by the side of the *Singleton Abbey* has been directly occasioned by the *Paludina*. Is it to be held a fault on the part of the *Singleton Abbey* that the captain did not stop his engines five seconds sooner? I do not think we should so hold. I think he was put in a position of extraordinary difficulty; he acted for the best. I should like to add that even supposing he had stopped his engines, doubtless the injury to the *Sara* would have been less grievous—that damage is not in question in this case—yet the end of his propeller, especially if it was a four-blade propeller, would probably have been injured all the same. That, however, is only a remark. As it is, I think the master of the *Singleton Abbey* committed no fault, and consequently I agree with the result reached by the learned President, and think that the appeal should be allowed.

Lord Sumner. My Lords, in order to succeed as to the fourth collision—i.e., the second with the *Sara*, when she

(1) [1922] 1 A. C. 129, 136.

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was holed by the revolving propeller of the *Singleton Abbey*—the plaintiffs must prove that the *Paludina's* negligence was the cause of it. The injury must have been caused directly, though not necessarily solely, by that negligence. If the *Paludina* merely created the occasion upon which this injury was inflicted, they fail.

I take the clear and candid evidence of the master of the *Singleton Abbey* (Questions 576, 577). He says, in effect, that he miscalculated by a few seconds the time when the *Sara*, moving along his ship's side and in contact with it, would be drawn under his counter by the revolutions of his propeller, and that he kept it revolving those few seconds too long. He clearly means, and he is right, that, if he had signalled his engines to stop that much earlier, the accident would not have happened. There would have been no contact or at any rate no injurious contact of the *Sara* with his screw. Neither would any misfortune have happened to his own ship.

The situation was one of some difficulty, in the sense that it required nice judgment, prompt decision, and rapid action, but it was in no way analogous to what is called the "agony of the collision"—that is of the first three collisions or any of them—it was in no way analogous to cases where, as the direct result of a collision with one vessel, a ship is forced into contact with another or has perforce to let herself drive into such contact. The situation was in no respect uncommon; the weather was not such as to tie a captain's hands, and he was at his post, in broad daylight, with steam up and in charge of an undamaged ship. He could do as he chose and he did so, none the less that he had to decide and act quickly. If ever a captain was a free agent, Captain Hughes was. If it is to be said that he was not, it must simply be because the presence and actions of neighbouring ships had set him a nice problem to solve. If so, few ships moving in harbours are ever free agents.

My Lords, the *Paludina* is not liable for mere negligence, but only for negligence causing damage. The *Singleton Abbey* herself is the cause of the damage she has suffered, not

merely if her captain's action brought it about negligently. She will be the cause of that damage, if her captain, freely and as the direct consequence of his own decision, brought it about at all. This aspect of the matter does not seem to have been called to the attention of the learned President, such was the complexity of the whole case, and so subordinate was this particular collision. Now that it is the only remaining matter in issue, the question becomes crucial.

Two answers have been attempted to this obvious proposition. It is said, first of all, that the captain's action, though free and voluntary, was not the sole cause of this collision, because the *Singleton Abbey* was then dragging her anchors. It is said that they were dragging because the negligence of the *Paludina*, some twenty minutes before, had loosened them in the ground or torn them from their hold, and that accordingly the *Singleton Abbey* was pro tanto a crippled ship, which could only be kept from further disaster by such handling as was possible to her in that condition—namely, by steady use of her engines. If this were so, *The City of Lincoln* (1) would apply. In that case the captain, it is true, steered his own course, as every navigator must, but he steered it wrong because his means of observation, the log, etc., had been carried away in the collision. The hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortunes. But for this the decision must have been otherwise : see also *British Columbia Electric Ry. Co.* v. *Loach.* (2)

My Lords, I ask, then, have the plaintiffs made out that the *Paludina's* negligence was still operating, as a legal cause of injury, when Captain Hughes made his miscalculation, or, in other words, was it proved that the anchors of the *Singleton Abbey* were dragging then ? I think this has not been proved. We hear of this dragging of her anchors at the time, when the *Paludina* fell down on the *Singleton Abbey's* cable and also burst her moorings, but Captain Hughes describes the satisfactory position into which his ship had got before the

(1) 15 P. D. 15. (2) [1916] 1 A. C. 719.

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Sara subsequently bore down upon him, in language which is quite inconsistent with the anchors dragging then. Naturally, lying as near to a shoaling shore as he did and in such a wind as there was, with his stern moorings gone and with other vessels in like difficulties near him, he kept using his engines as required to keep control, but, as he says, "I was all right, once I got her head to wind—quite satisfied then" (Question 529). The subsequent action of the *Sara* forced him to port and brought him nearer to the shore and with the wind more on his broadside. He then had to put his engines full ahead to try to get up to windward again (Question 555), but all this and all his account of it is inconsistent with his anchors continuing to drag still, or causing him any apprehension or compelling him to any particular action. I do not mean that Captain Hughes was negligent, but that he miscalculated his action. Still his action was his own. No part of it was a "natural" consequence of the *Paludina's* action, except in a sense that would make negligence on his part also a "natural" consequence. His action was wilful, and, though rapid, was deliberate. The *Paludina's* negligence did not make him take it. Cause and consequence in such a matter do not depend on the question, whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not.

My Lords, with the greatest respect I am not able to accept either the proposition, that the *Paludina* put the *Singleton Abbey* in such a position of alternative danger, that her captain's "not unnatural" action does not break the chain of causation between the *Paludina's* bad management and the *Singleton Abbey's* revolving propeller, or the proposition that "when a man by his wrongful act has caused impending damage to the property of another and that other can only save himself by passing on the injury to a third, this third person can recover his damage from the original wrongdoer."

As to the first, "alternative danger," as used in *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1), refers to personal danger. It has not been extended to danger to property.

(1) (1869) L. R. 4 C. P. 739.

Adams's case was one in which it was held that no situation of alternative personal danger had arisen and that expression referred to *Scott* v. *Shepherd* (1) and *Jones* v. *Boyce* (2), cases where, in a situation of imminent peril caused by the wilful or negligent act of the defendants, the plaintiff has taken instant action on the first alarm. Jones was presented of a sudden with the choice " to jump or not to jump "—he chose automatically and without reflection. *Scott* v. *Shepherd* (1) was the same. I cannot but think that, if it had been suggested to Captain Hughes that he acted like Mr. Jones, his repudiation would have been emphatic. If anything put him in danger, it was the action of the *Sara*, taken not because she was a helpless instrument in the *Paludina's* careless hands but because she got up her anchor before she had enough steam on her main engines.

The relevancy of the second proposition would arise, if the *Sara* sued the *Paludina* for the damage by the *Singleton Abbey's* propeller, which sank her, but it leaves untouched the question whether the *Sara* might not equally recover from the *Singleton Abbey*, nor does it solve the problem how the *Singleton Abbey* can recover from the *Paludina* for injury to her own propeller, which her captain, and not the *Paludina's*, kept revolving a little too long. *Collins* v. *Middle Level Commissioners* (3) I have long doubted and should, when it becomes material, desire to reconsider with much care. The report shows that it was a somewhat summary decision. It is at any rate difficult to reconcile with *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (4), nor do I think that the principle of *Greyvensteyn* v. *Hattingh* (5) can be applied to support it, but it may be that it can be justified by treating the Commissioners' flood-water as a cause of danger, operating by their negligence simultaneously and concurrently with the action of the parties who turned it off their own land on to that of Collins, in which case the Commissioners would not escape liability for their continuing wrong merely because third parties had

(1) (1773) 2 Wm. Bl. 892; 3 Wils. 403.
(2) (1816) 1 Stark. 493.
(3) L. R. 4 C. P. 279.
(4) (1884) 13 Q. B. D. 131.
(5) [1911] A. C. 355.

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given a particular direction to the dangerous element, which they had let loose and had kept unrestrained in the neighbourhood. In any case it is remote from the present issue.

The second answer connects the action of the *Singleton Abbey* with the *Paludina* by way of the compelling effect which the negligent action of the *Paludina* is supposed to have had upon the behaviour of the *Sara*. It puts the innocence or fault of the *Sara* in the forefront. It first asks "was the action of the *Sara* novus actus interveniens?" And having answered this in the negative, it goes on to the action of the *Singleton Abbey* and asks "was that action contributory negligence?" In this view, if the *Sara* was not to blame, it is said to follow inevitably that the chain of causation from the *Paludina's* original fault to the *Sara's* contact with the *Singleton Abbey* remains unbroken. Her action was necessarily the sequel of the original wrongful action of the *Paludina*, and the *Singleton Abbey*, finding herself suddenly in a difficult place, cannot be convicted of contributory negligence. Her captain committed no fault and, if he committed none, all the fault must be the *Paludina's*.

In view of these considerations it becomes necessary to come to a decision as to the *Sara*, but the true issue is "Aye or no, has the *Singleton Abbey* proved the *Sara* to have been free from blame, and therefore a mere link in the chain of causation between the *Paludina's* blunder at 11 A.M. and the error in judgment of the captain of the *Singleton Abbey* at 11.20?"

The evidence is practically all given by Captain Hughes, and in any view of the matter he certainly does not prove that the *Sara* was free from blame. Obviously he thought that she was in fault, though he spoke of her ironically (Questions 543 to 548), and there is much to be said for that view. The *Sara* first of all cut her stern moorings; then she steamed up to her bow anchors; then she got them out of the ground, and then she went astern. What for? If she had steam on her main engines, why did she not steam ahead, as soon as her anchor was up, and get out of the *Singleton Abbey's* neighbourhood? If she had not steam on her main

engines, why did she get her anchors out of the ground and so go adrift at all? In spite of the *Paludina* and her sins, the *Sara*, as long as she let her bow anchors alone, was safely riding on the starboard bow of the *Singleton Abbey*, and the *Singleton Abbey* was safely anchored clear of the *Sara*, relieving any strain on her own anchors by suitable engine action. Captain Hughes was not in any extraordinary difficulty; he could see all the risks to which he was exposed; he had time enough, though short, in which to decide, and without saying he was to blame, he was, on his own showing, just a little too sanguine. There was nothing merely instinctive about his action. It was deliberate and it was almost right.

I certainly cannot say that the *Singleton Abbey* proved the *Sara* to have been free from blame; or to have been a mere instrument in the hands of the *Paludina*, and this conclusion prevents me from finding for the *Singleton Abbey* on the second view. Accordingly, my Lords, I think the appeal fails.

LORD PHILLIMORE. My Lords, I agree with the noble and learned Lord Viscount Dunedin that the *Sara* cannot be deemed to have been negligent in the matter of the fourth collision in this case, and that the judgment of the learned President (confirmed as it was on this point by the judgment of the Court of Appeal) should stand.

I agree also that in respect of the charge of negligence against the master of the *Singleton Abbey*, the judgment of the President was right, and that the Court of Appeal was too severe in finding negligence on his part. I find support for this conclusion in the case of *The Bywell Castle*. (1)

As the learned Lords Justices based their judgment in favour of the *Paludina* upon this finding of negligence, it might seem that there was nothing further to be said, and that their judgment must be reversed forthwith.

But in my view there is still a serious question to be considered. The act of the master of the *Singleton Abbey* in keeping his engines going as the *Sara* was passing down his side, and keeping them going a little too long so that the

(1) (1879) 4 P. D. 219.

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propeller was still moving when the *Sara* got under his counter, was an act of volition—not automatic, reflex, or without consciousness of what he was doing. And it is a nice question whether this interposition of human agency breaks the chain of causation which connects the original wrongdoing of the *Paludina* with this fourth collision, or, as may be otherwise expressed, the second and last collision with the *Sara*.

I address myself, therefore, to this point. In the case of a tort or quasi-delict, the wrongdoer is certainly liable for damages not directly produced by his own act but supervening in direct and natural consequence.

My Lords, since this case was heard, I have looked into a number of the reported authorities, including *Weld-Blundell* v. *Stephens* (1), and I do not think it necessary to restate many of the conclusions to which those cases point. Two propositions and two only should, I think, govern our present decision.

(*a*) If the action which brings the injury for which the damage is sought to be recovered is human action, either of the injured person himself or of some third person, this novus actus interveniens will break the chain of causation unless (*b*) the act of the original wrongdoer has put the injured person, or it may be a third party, into such a situation of alternative danger, that it is uncertain whether it would be better for him to act or not to act. His not unnatural action in such circumstances does not break the chain of causation.

As Lord Ellenborough says in the case of *Jones* v. *Boyce* (2): "It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril"; and as Montague Smith J. says in *Adams* v. *Lancashire and Yorkshire Ry. Co.* (3): "If the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence."

(1) [1920] A. C. 956. (2) 1 Stark. 493, 495.
(3) L. R. 4 C. P. 739, 742.

In *The City of Lincoln* (1) the master of a ship seriously injured by a collision and reasonably and properly making for the Thames, being deprived of the ordinary helps to navigation, made a mistake in his course and ran the ship aground, and it was held by the Court of Appeal that this grounding might be deemed a natural consequence of the collision or, as it is sometimes expressed, a direct and natural consequence. It is true that Lord Esher in that case expressed himself as not intending to carry the principle so far, but if the details of the case be looked into, it would be seen that he only arrived at his conclusion of fact by accepting this very principle.

Lindley L.J., in the same case, says: "We have then to consider what is the meaning of the 'ordinary course of things.' Sir Walter Phillimore has asked us to exclude from it all human conduct. I can do nothing of the kind. I take it that reasonable human conduct is part of the ordinary course of things. So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss." Then he, too, quotes *Jones* v. *Boyce*. (2)

And Lopes L.J. thinks he has done enough when he has decided that there was no want of skill on the part of those on board the injured ship.

The second proposition (*b*) is that where a man by his wrongful act has caused damage or impending damage either to the person or to the property of another, and that other can only save himself or his property by passing on the injury to a third, this third person can recover his damage from the original wrongdoer. *Scott* v. *Shepherd* (3) is the case of danger to person, and *Collins* v. *Middle Level Commissioners* (4) is a case of danger to property.

Applying these principles to the present case, it would seem that the master of the *Singleton Abbey* took the action

(1) 15 P. D. 15, 18.
(2) 1 Stark. 493.
(3) 3 Wils. 403.
(4) L. R. 4 C. P. 279.

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which is now complained of, or which is now said to break the chain of causation, when he was in a situation of alternative danger, and that he took a reasonable though as it happened in the end an unfortunate step, and that if he thereby injured his propeller and damaged his neighbour the *Sara*, he did so in a legitimate attempt to transfer the risk from his own ship to another.

After all, my Lords, I cannot put the point more simply than by saying that I ask myself whether it was a natural thing for the master of the *Singleton Abbey* to do to keep his engines going; and as I think it was and that the *Sara* was not negligent, the consequence was a natural consequence of the first mismanagement of the *Paludina*. Therefore, my Lords, I think that the conclusion which the Court of Appeal arrived at was wrong, and that the judgment of the President should be restored.

LORD CARSON (read by LORD BLANESBURGH). My Lords, I agree with the noble Viscount on the Woolsack that in considering the question as to whether the third collision which led to the sinking of the *Sara* was due to the original fault of the *Paludina* or to a novus actus interveniens, one must first make up one's mind whether the *Sara*, in doing what she did, was, or was not, guilty of any fault upon her part. Upon this point Atkin L.J. puts the case very clearly. He says: "Here are two ships set loose in harbour by the admitted negligence of the defendants, but twenty minutes afterwards one of the ships comes into collision with the other ship and the mere collision itself practically causes hardly any damage at all. The material question is whether on the second contact it was the result of the collision that the *Sara* was sunk by coming into contact with the moving propeller of the *Singleton Abbey*. In this case I am bound to say that, speaking for myself, I can see no evidence, first of all, that the collision caused the *Sara* to drop down upon the *Singleton Abbey*. Indeed, I think that that is the result of the learned President's finding, so far as I can see, because he says he has consulted the Elder Brethren and they tell

him that in the state of things he has described they cannot say the *Sara* was to blame for this collision, but they cannot tell him why it probably was the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*." My Lords, I cannot agree with the noble Viscount that there was no fault on the part of the *Sara* in doing as she did and that the chain of causation for the original fault remains unbroken. As Lord Sumner points out, the evidence on this point is practically all given by Captain Hughes, the master of the *Singleton Abbey*, and shortly amounts to this, that if she had made proper use of her steam power she ought not to have fallen down upon the *Singleton Abbey*, as after the first impact with the *Sara*, when she shifted ahead, she was clear of the *Singleton Abbey* for fully a quarter of an hour. I may add that no evidence was called for the *Sara* and I find it impossible to come to the conclusion, as Lord Sumner has said, "that the *Singleton Abbey* proved the *Sara* to be free from blame or to have been a mere instrument in the hands of the *Paludina*," and I cannot therefore hold that the chain of causation for the original fault remains unbroken.

Under these circumstances I am of opinion that this appeal fails. I think, however, it is right that I should state that as regards the action of Captain Hughes in keeping his engines going and thereby causing the propellers to revolve for a few seconds too long, I am in agreement with the opinion expressed by the noble Viscount on the Woolsack.

Lord Blanesburgh. My Lords, I am in entire agreement in this case with my noble and learned friend Lord Sumner, whose opinion I have had the advantage of reading and considering.

It may be that when he entered the witness box in this suit the influence of the proceedings at Malta between the *Sara* and the *Singleton Abbey*, in which the captain of the *Singleton Abbey* gave evidence, remained strong upon him. Whether so or not, however, it was here his task to prove, if he truthfully could, that the *Sara* was free from blame for her second collision with the *Singleton Abbey*. He made

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no effort to prove anything of the kind. His view of the conduct of the *Sara*, in relation to that collision, quite plainly was that it could not be rationally explained. Having the whole harbour to manœuvre in, she, twenty minutes after the first of the two collisions, raised her anchors, either without steam up at all or without enough, or with steam up not using it. If she had steam available—as either was or should have been the case—there was no reason why she should have fallen upon the *Singleton Abbey*. On this Captain Hughes is quite express (Questions 545–548), and, as to the conduct of the *Sara*, his is the only evidence adduced. In these circumstances, my Lords, so far from the *Singleton Abbey* proving that the *Sara* was free from blame in relation to this second collision, and for the damage to the *Singleton Abbey* resulting therefrom, all the *Singleton Abbey* has succeeded in suggesting, as my noble friend has so clearly shown, is that this damage is due to her own direct action in the working of her engines, coupled with the action or want of it on the part of the *Sara*, which, whether or not grossly negligent, was at any rate something for which the *Paludina* was in no way responsible, except in the sense that her original fault may have created the occasion.

As this clearly is not enough for the *Singleton Abbey* it follows that, in my judgment, this appeal of hers fails.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 8, 1926.

Solicitors for the appellants : *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for the respondents : *Waltons & Co.*

[HOUSE OF LORDS.] Considered. SIMPSON v. SIMPSON [1951] P. 320

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OWNERS OF STEAMSHIP HONTESTROOM . . . . . } APPELLANTS;

AND

OWNERS OF STEAMSHIP SAGAPORACK . . . . . } RESPONDENTS.

OWNERS OF STEAMSHIP HONTESTROOM . . . . . } APPELLANTS;

AND

OWNERS OF STEAMSHIP DURHAM CASTLE . . . . . } RESPONDENTS.

Shipping—Collision—Evidence—Port of London River By-laws, 1914, *r.* 36.

By r. 36 of the Port of London River By-laws: "Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her":—

Held, that the expressions "navigating against the tide" and "navigating with the tide" refer to an actual tidal stream, operating at the time and place sufficiently to differentiate for the purposes of practical navigation between with it and against it and not merely to the state of the tide, i.e., ebb or flow, according to the published anticipations of the local time tables.

In actions arising out of a collision between the *Hontestroom* and the *Sagaporack* and a consequential collision between the *Sagaporack* and the *Durham Castle* the President found on the facts that the *Sagaporack* was solely to blame for both collisions, but his decision was reversed by the Court of Appeal, who found that the *Hontestroom* was solely to blame.

On appeal to the House of Lords:—

Decision of the Court of Appeal reversed, and decision of the President restored, on the facts by a majority (Viscount Dunedin, Lord Sumner, and Lord Carson; Lord Phillimore being of opinion that the *Hontestroom* and the *Sagaporack* were both to blame, and Lord Blanesburgh that the *Hontestroom* was solely to blame).

Observations of Lord Sumner on the practice of the Court of Appeal in reviewing decisions of the Admiralty Court depending on the credibility of witnesses.

* *Present:* VISCOUNT DUNEDIN, LORD SUMNER, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

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APPEALS from a decision of the Court of Appeal reversing a decision of the President.

Shortly after 6.30 P.M. on December 3, 1924, the weather being fine and clear, a collision occurred in the Thames near Blackwall Point between the *Hontestroom*, which was bound from London for Amsterdam, and the *Sagaporack*, which was on a voyage from Boston to London. Immediately afterwards a second collision occurred between the *Sagaporack* and the *Durham Castle*. This collision arose as a consequence of the first, and it was admitted that the *Durham Castle* was not to blame.

The *Hontestroom* brought an action against the *Sagaporack* to make her liable for damage sustained by the *Hontestroom* in the first collision. The *Durham Castle* brought an independent action against the *Hontestroom* in respect of the second collision, alleging that the *Hontestroom* by her collision with the *Sagaporack* had caused the subsequent collision between the *Sagaporack* and the *Durham Castle*.

The two actions were tried together.

The facts are fully stated in the judgment of Lord Sumner. At the time of the first collision the tide, which was a neap tide, wanted twenty minutes to high water at London Bridge.

The two main questions in dispute were: (1.) whether at the time and place of the collision there was any perceptible tide, so as to make it incumbent on the *Hontestroom*, as the vessel navigating against the tide within r. 36 of the Port of London River By-Laws, 1914, to stop and wait before rounding Blackwall Point, in order to allow the *Sagaporack* to pass clear of her, and (2.) whether the *Hontestroom*, which had starboarded for a sailing barge, had ported sufficiently and in sufficient time, or whether the *Sagaporack* had improperly starboarded.

The President, who was assisted by two Elder Brethren of the Trinity House, found that there was no appreciable tide at the time of the collision and held that r. 36 did not apply, and on the facts he found the *Sagaporack* solely to blame for both collisions.

In the Court of Appeal the nautical assessors, differing

from the Elder Brethren, in answer to questions put by them to the Court, were of opinion that, having regard to (*a*) r. 36 of the Thames Rules; (*b*) the presence of the *Durham Castle* at the north side of the channel; and (*c*) the sailing barge crossing from north to south, those in charge of the *Hontestroom* were guilty of want of care and proper seamanship (1.) in starboarding for the barge, and (2.) in not stopping and allowing the *Sagaporack* to pass clear; and the Court (Bankes, Scrutton and Atkin L.JJ.), agreeing with this advice, found the *Hontestroom* solely to blame for the collisions.

1926. April 26, 27, 29, 30. *Sir John Simon K.C.* and *Stephens K.C.* (with them *Stranger*) for the appellants. The President, accepting the appellants' evidence as to the tide, after consulting the Trinity Masters, found that the tide at the time of the collision was negligible and therefore held that r. 36 of the Port of London River By-laws did not apply. In order that the rule should apply there must be an actual tide to navigate against.

[They referred to Marsden's Collisions at Sea, 8th ed., p. 538, notes (*d*) and (*e*); *The Libra* (1); *The Margaret* (*Cayzer, Irvine & Co.* v. *Carron Co.*) (2); *The Kennet.* (3)]

Butler Aspinall K.C. and *Langton K.C.* (with them *Stenham*) for the respondents in the first appeal. There was some tide at the time of the collision. The President's finding on this point is obscure. He found, on the advice of the Elder Brethren, that "there was no tidal action which entered as a substantial factor in their judgment into this case." Bankes L.J. was of opinion that there was a flood tide running at the time and that its force was something less than a knot or two, and that, as the *Hontestroom* was navigating against the tide, however slowly that tide might have been running, she came within r. 36. Scrutton L.J. was also of opinion that the *Hontestroom* was navigating against the tide within the meaning of the rule, and Atkin L.J. concurred.

[They referred to *Admiralty Commissioners* v. *S.S. Volute.* (4)]

(1) (1881) 6 P. D. 139.
(2) (1884) 9 App. Cas. 873, 885.
(3) [1912] P. 114.
(4) [1922] 1 A. C. 129.

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Sir John Simon K.C. replied.

Dunlop K.C. (with him *Dumas*) for the respondents in the second appeal referred to *Owners of S.S. Devonshire* v. *Owners of Barge Leslie.* (1)

Sir John Simon K.C. replied.

The House took time for consideration.

1926. July 20. LORD SUMNER. My Lords, this collision took place in the Thames between the plaintiffs' steamer *Hontestroom,* outward bound and light, and the defendants' steamer *Sagaporack,* inward bound for Millwall Dock and laden, on a December evening after dark at a point fixed by the learned President as about 100 feet south of midchannel, and agreed to have been slightly to the east of a line drawn between the lower entrance to the East India Dock Basin and Blackwall Point. The wind's direction was uncertain ; its force was very light. The tide was neap and near high water.

The ships collided not far from end on. The *Hontestroom's* stem and port bow and the port bow of the *Sagaporack* came into contact and the latter vessel was cut into and went to starboard. The angle between them, as measured on an examination of the damage, was some 30° ; as marked in the witness box by the master of the *Hontestroom* it was considerably finer. The *Sagaporack* immediately afterwards came into violent contact with the starboard quarter of the *Durham Castle,* doing damage. Lord Merrivale, after a protracted trial, held the *Sagaporack* solely to blame. The Court of Appeal put all the blame for both collisions on the *Hontestroom.* Hence these appeals by the *Hontestroom,* the *Sagaporack* being respondent in the first and the *Durham Castle* in the second. If the *Hontestroom* is exonerated from blame, both appeals succeed.

I think that the crucial matters in the case must be admitted to be the position and manœuvres of the two vessels during the short time between their first being

(1) [1912] A. C. 634.

visible to one another and the collision, and especially when, somehow, such a change took place at last as brought them together instead of passing port to port. Their prior courses and speeds, whistle signals and helm and engine actions are no doubt matters which go to test the credit of the witnesses, but are otherwise only introductory to the crucial incidents. Accepting, as both parties now do, the position fixed for the collision, it is clear that one pilot or the other (if not both) starboarded at the wrong time, and too much; otherwise the ships would not have come into collision.

The answers to Questions 156 and 157 on the one side and to Questions 1073 to 1086 on the other make this the plain issue. The two Thames pilots, who were respectively in charge, must therefore between them have known quite well, who it was that starboarded into the other. I will not say that it was a case of hard swearing, for I think that the crowded condition of the river at the moment may have led the *Sagaporack's* pilot to be rather confused, but in proportion as this relieves him from the imputation of false swearing it tends to discredit his navigation. There was, on the other hand, no particular reason why the *Hontestroom's* pilot should have been hustled. He admitted a certain amount of starboarding and explained it, I think, quite plausibly. If he is believed, this starboarding did not affect the collision. He also said that at the last moment the *Sagaporack* appeared to be acting under a port helm, as if trying to correct the consequences of her excessive starboarding, and this manœuvre appears to be an essential part of the *Hontestroom's* case, if the position in which the two ships came together is to be reconciled with her claim to be free from blame.

The learned President, after seeing both pilots, accepted the story of the *Hontestroom*. Though he does not expressly say so, it is evident that he regarded the *Hontestroom's* pilot as an honest and a credible witness and, conversely, that he did not accept the story of the pilot of the *Sagaporack*, not thinking that his memory could be trusted. He also accepted the evidence of the *Hontestroom* that the *Sagaporack* was

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beginning to port back again, just before the collision occurred, and he did so in spite of the fact that the *Hontestroom's* preliminary act made no mention of this porting. I therefore think, for my own part, that the real issue in this case is, whether the Court of Appeal was justified in laying aside the learned President's view as to the relative credibility of the witnesses and the conclusions of fact which he rested thereon, and in reviewing afresh the whole of the evidence, so as to form their own opinion without regard to his appreciations.

The Court of Appeal was of course fully alive to the consideration that he had had the advantage of seeing the witnesses, and Bankes L.J. says that the members of the Court "hesitated" accordingly before arriving at a different conclusion, though he alone gives his ground for doing so in general terms. He says: "Put briefly, the case is not one in which the learned judge selects one witness, and says 'here is a man who is not only honest but is entirely reliable on all points,' and then selects another, and says 'this man has not tried to tell the truth, or he is so inaccurate a witness that his evidence is of no importance.'" Now it is true that the learned President does not use these formulæ, but he speaks of the two pilots in a way which differs from them only in form, and says: "I have come back to the human factor, and have considered whether I ought to have been minded, as I was minded, to believe the pilot of the *Hontestroom*, and I have come to the conclusion that, believing him as I did when I heard him, I was warranted in believing him that he was proceeding at the speed which he states." He dwells on this pilot's frankness and honesty in another matter, and nowhere gives as his reason for not accepting some of the details of his evidence, that he thought him in this respect an unsatisfactory witness. Contrast this with his observations on the evidence of the master of the *Sagaporack*, "if I could accept it at its face value," and "if there is anything which is clear upon the case with regard to the place of the collision," it is that it was not where this witness "insisted" that it was. He says again of the

Sagaporack's witnesses generally: "The real question . . . . is whether effective continuous port helm action was interposed after his (the *Hontestroom* pilot's) starboard helm action for the sailing barge or was not so interposed. If effective continuous port helm action was interposed, then the account given me by the *Sagaporack* is not the correct account, because what is required for their case is starboard helm action of a relatively violent kind, which threw the *Hontestroom* off her course. . . . . I attended to the several witnesses, and the conclusion at which I arrived, and of which I am convinced, is that, after the slight starboarding action for the sailing barge, the pilot of the *Hontestroom* did take steady and continuous port helm action for what, in the circumstances of the case, is a substantial period of time." It seems to me that the difference between what the learned President said and what Bankes L.J. dwells on his not having said is only one of words.

The Lord Justice then goes on to say that there is a point, not touched by the learned President, which in his own opinion is the turning point in the case against the *Hontestroom*, and is what leads him to his conclusion that all the blame was hers. After setting out her case at length he says: "The one significant fact about the story, to my mind, is that according to that story the collision could not have happened but for the porting of the American vessel within a vessel's length of the Dutch vessel, and that last act of porting, which alone made the collision possible, is no part of the pleaded case. Not only is it no part of the pleaded case, but it seems to me to come out of the evidence of the pilot and master almost incidentally, because, when the pilot is asked at Question 156 what the cause of the collision was, he says the excessive speed of the *Sagaporack* navigating in the south of the channel and over-starboarding. Now it is quite true that later on, and also before he had mentioned, as it were incidentally, this last act of porting, when he was asked specifically by his own counsel the question what was the cause of the collision, he made no mention at all of this last

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act of porting and he gave an account, which, read in conjunction with the rest of his evidence, appears to me to show that the collision was an impossible one."

My Lords, this matter is doubly important. It is on it that the Lord Justice principally founds his own conclusion, and it is on the supposed failure of the learned President to pay attention to it that he largely relies, as justifying him in reopening the whole controversy. It has also much impressed some of your Lordships and has been elaborated considerably beyond even the presentation of it, which I have quoted. I think the view is taken that the true effect of the judgment of the Court of Appeal is to say that evidence of a manœuvre not disclosed in the preliminary act is evidence, which ought ipso facto to be disbelieved. It seems to me that such a summary mode of dealing with such evidence goes much too far.

In reality, this matter did not escape the notice of the President, for he refers to it as one which he regards as established by the evidence. In my judgment, for whatever it may be worth, he correctly appreciates its significance, which is not intrinsically considerable, in the sequence of the manœuvres of the two ships, and he was well warranted in passing it over without more discussion, when once he had formed and expressed his conviction that the *Hontestroom's* story of the cause of the collision was true.

Of course, my Lords, the preliminary act of the *Hontestroom* ought to have mentioned that, at the last moment, the *Sagaporack* acted apparently under a port helm, but so late and so little that the collision was not averted. No one disputes this, nor can any one fail to appreciate the risk of general discredit that this omission justly brought on her whole case. The evidence was, however, given by two witnesses who were in an excellent position for observation. It was admitted without objection. It was given, in its natural place in the story and without any leading, by the first witness, Smith, the pilot (Question 106). His meaning was elucidated in cross-examination (Questions 452–458), and the subsequent cross-examination of the maste·

(Questions 690–696) made the point still clearer. The question is what was to be done with it.

It is quite impossible, to my mind, that the President, whether he said much or little about it in his judgment, could have failed to appreciate the weight of the *Sagaporack's* criticisms on this evidence. How could he fail to appreciate the weight of the contention, that witnesses, who spoke to a manœuvre, on which their preliminary act was silent, could not be trustworthy? Consider who the counsel were, who opposed the *Hontestroom;* consider how the witnesses had been cross-examined, obviously in the hope that they would improve upon their evidence till they had palpably overdone it. Could there be any issue more specially fit than this for the determination of a trial judge? If he thought this story was false, he must at once have said that the *Hontestroom's* witnesses were exceptionally brazen and that her whole claim to innocence was gone. Her case was that she was proceeding under continuous and effective port helm, when the *Sagaporack* starboarded into her from the N. and E. How then could the *Hontestroom* run into the *Sagaporack's* port bow? Only in one way. Deliberation must have satisfied the learned President that the *Hontestroom's* story of a last moment port helm action on the part of the *Sagaporack* was true, and, if so, who could so well decide such an issue as the judge, who alone had under his eye the men who told him this belated tale?

My Lords, one must not overlook the difference in the procedure of the Court of trial in an Admiralty case and of the Court of Appeal. If you begin by scrutinizing the *Hontestroom's* story on the shorthand note after the case against her has been made not once but thrice and if it then impresses you unfavourably, if thereafter you follow her up to her starboarding for the sailing barge with growing doubt, and if you come finally upon a manœuvre of the *Sagaporack*, which is requisite to save the *Hontestroom* from blame but is not to be found in her preliminary act, I can well understand that you would cry: "What need have we of further testimony? Let there be judgment for the defendant."

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But suppose the sequence is otherwise, as at the trial it was. Watching the witnesses in the box and not merely perusing the shorthand notes, listening to what they say without any previous preparation of an adverse kind, free from the prepossessions which an opening by counsel occasions, a judge in the Admiralty Court watches the case as it is built up by the witnesses themselves. He reads their faces, not a shorthand note. He weighs their value as he goes along. Suppose, as the learned President's judgment shows his own process to have been, that he forms the conviction that they are honest and accurate witnesses and, this conviction being confirmed rather than the reverse by the *Sagaporack's* witnesses, he concludes that the starboarding for the barge formed no part of the collision, and that the *Hontestroom's* port helm action was "substantial, continuous and effective at the material time." In such a process why should he debate or doubt this ultimate incident in their story? Why should he make a mountain out of what, apart from the question of credibility, already settled in his mind, is really a molehill? Such late porting was likely enough. If it failed, it could do no harm; it might, peradventure, recall the effect of over-starboarding just enough to bring the ships once more port side to port side. If the *Hontestroom's* witnesses had been silent about it, I think it would properly have been inferred from the position in which the ships came into contact, when once the *Hontestroom's* version of her manœuvres had been accepted.

I am greatly encouraged in the view I take of this late porting incident by the fact that, with all his unrivalled experience in the Admiralty Court, my noble and learned friend Lord Phillimore accepts it, gravely as he reprehends the omission to state it in the preliminary act. [After dealing with some criticisms of the Lords Justices on the learned President's judgment his Lordship continued:] In truth, apart from the point that arises on r. 36, everything is really preliminary or else goes to credit till you get to the time, when the *Hontestroom* starboards for the sailing barge. She and the *Sagaporack* were then safe, but were

approaching one another; a blunder followed, and the real question is who blundered? The only object in going over this ground again is to see if the *Hontestroom's* witnesses can be convicted of falsehood as to her action after they saw the barge, and that operation is out of place, till it has been shown that the President's own handling of this matter ought to be set aside.

What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1) Lord Kingsdown says: "They, who require this Board, under such circumstances, to reverse a decision of the Court, below upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . . We must, in order to reverse, not merely entertain doubts

(1) (1860) 14 Moo. P. C. 210, 235.]

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whether the decision below is right, but be convinced that it is wrong." Wood L.J., in *The Alice* (1), says: "The principle established by the decision in *The Julia* (2) is most singularly applicable. . . . . We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made." James L.J. thus laid down the practice in *The Sir Robert Peel* (3): "The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

Again, in *The Glannibanta* (4) the Court of Appeal, after referring to *The Julia* (2) and *The Alice* (1), say that they would not be disposed to reverse, "except in cases of extreme and overwhelming pressure," but, being of opinion that the trial judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way.

My Lords, this appeal illustrates in two ways the unsatisfactory results which follow from disregard of this settled practice. On the question of seamanship the learned President finds the *Sagaporack* alone to blame; the Court of Appeal (Bankes L.J. on one ground, Scrutton L.J. on another, Atkin L.J. generally) find the *Hontestroom* alone to blame. One of your Lordships finds that they were both to blame, and another is of opinion that the facts condemn the *Hontestroom* much more conclusively than the Court of Appeal did. These questions must always be very difficult,

(1) (1868) L. R. 2 P. C. 245, 248, 252.
(2) 14 Moo. P. C. 210, 235.
(3) (1880) 4 Asp. M. L. C. 321, 322.
(4) (1876) 1 P. D. 283, 287.

when the data can only be ascertained from evidence tainted by the frailty and fallibility of human nature, in the person of a pilot whose navigation is impugned. At least we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case, if his views do not agree with our own, or by overruling his estimate of the witnesses on a paper review of their words, stripped of the material colour, which hesitation or promptitude, shiftiness or candour may well have given them. It is, of course, true that the trial judge may have been imposed upon, but I think it is more useful, that we should be on our guard against imposing on ourselves.

Again, a good deal of fun has been poked at what is called "Admiralty arithmetic," but the scoffer always has to fall back on the use of it himself. What else can he do? As tests of the credibility of a nautical tale these calculations are invaluable, but they cannot be infallible. They sometimes prove logically that there was no collision at all. In the present case, for example, I am quite unable to see what material is furnished by the evidence to enable any one to vary the President's express finding of port helm action by the *Hontestroom* for a substantial time after she starboarded for the barge, which he obviously believed to have been effective action. The collision is there, and to explain it one may say that the *Hontestroom* had not time in which to correct her starboard helm. This, however, is pure hypothesis. We may review the whole case by conjectures of our own, but as all calculation rests on some assumed position, course, observation or speed, which itself has to be taken from one witness or another, it is eventually not the arithmetic nor the conjecture, but the trial judge's impression that should prevail. The only alternative is boldly to ask oneself, which story is the more probable, and, speaking for myself, I am a poor hand at answering that kind of question.

My Lords, for these reasons I do not propose to retry this case, nor do I think that the Court of Appeal should have done so. I particularly refrain, and for this reason only, from examining and criticizing the judgment of Scrutton L.J. in

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detail. The material questions to my mind are: (1.) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (2.) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3.) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression," or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect? [His Lordship then dealt with certain facts which were prejudicial to the personal credit of the *Hontestroom's* witnesses and referred to the conflicting stories told by the *Durham Castle* and the *Hontestroom*, and he stated his conclusion on the question of fact as follows:] Accepting, as I think we must, the data which the learned President ascertained for us under circumstances so much more favourable to a correct estimate than ours can be, I do not find in the inconsistencies, which no doubt can be pointed out here and there, sufficient ground on which to hold that in the manœuvres in question blame rests with the *Hontestroom*. It is not just to the learned President to suppose that he could have failed to observe the significance of any of these matters on which criticism is now founded. Under pressure of his other duties he was obliged to deliver his judgment orally and without further consideration, and in such circumstances imperfections in form and expression are inevitable; but his reiteration of the care, with which he had weighed the evidence and the arguments, would be insincere, if it did not mean, as I think it means, that among other things he had made full and careful use of his opportunity of judging the evidence by the light of the demeanour of those who gave it.

There remains a specific and totally independent point relating to r. 36 of the Port of London River By-laws. It raises two questions. The first is whether, as a matter of

construction, the expressions in this rule "navigating against the tide" and "navigating with the tide," refer to an actual tidal stream, operating at the time and place sufficiently to differentiate for the purposes of practical navigation between with it and against it, or only to the state of the tide, that is, ebb or flow, which at that place and time should be expected, according to the published anticipations of the local time tables applicable. In the latter case the rule applied to the *Hontestroom*, for on paper the tide was making and had not reached high water; in the former, the second question—what in fact was the strength of the tide there and then—has to be dealt with. The point is crucial, for it is surely plain that, if the *Hontestroom* was bound to comply with the rule and had fully done so, there would have been no collision, for she would have been waiting above the point well clear of the *Sagaporack* at the material time.

On the night in question the time of high water at London Bridge was 7.18 P.M. and, accordingly, when the *Hontestroom* approached Blackwall Point, high water time had not yet arrived by twenty minutes. Her case, however, is that on her side of the channel the actual movement of the water upstream was almost imperceptible and certainly negligible. Was she nevertheless bound to comply with r. 36? Counsel assured your Lordships that they had found no authority on this point, nor have I. The cases decided on this rule or on the older rule, art. 23, which contained the same words, are all cases in which the tide had actual force affecting navigation, and it may be inferred that in practice no others were regarded as coming within the rule. I notice that in *The Margaret* (*Cayzer, Irvine & Co.* v. *Carron Co.*) (1) Lord Blackburn and Lord Watson, and again in *The Ovingdean Grange* (2), Collins M.R., speak of ships "coming up with the tide," "approaching with the tide" and "coming down against the tide," all of which expressions were pleonastic, if the true meaning of the words is coming up or down before the time of high water. Although all the Lords Justices considered that the *Hontestroom* had broken r. 36, I am not sure from

(1) 9 App. Cas. 873, 879, 885. (2) [1902] P. 208, 212.

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their expressions that they all read the rule quite in the same way. Bankes L.J. says "if the vessel is navigating against the tide, however slowly it may be running, that vessel comes within the rule," which seems to make the test "is there any tide that is running there at all?" Scrutton L.J. puts it that vessels navigating against the tide shall, on approaching Blackwall Point, ease speed, and if necessary stop and wait. "That," he adds, "seems to me to make the vessel coming against the tide the 'give way' ship." He does not, however, deal with the possibility of there being no tide there at all to navigate against. The object, or one object, may be to diminish the risk of two ships trying to pass the point at the same time, and to impose on one of them the duty of giving way. Still the rule is so worded as to introduce, as a conditioning factor, a tide with or against the ship, not a mere relation of the one ship to the other, as in the Sea Rule. The give-way ship is one navigating against the tide, and she does not navigate against a tide, which is not there, merely because there may be enough tide on the other side of the river to make another ship a vessel which is navigating with the tide. Nor does the rule say "navigating against the tide so as to involve risk of collision." Its application depends on the existence of a tide against which one can navigate, and further adapts the action (if action there is to be) to the circumstances of the moment by distinguishing between obligatory easing of speed and stopping only if there is also necessity. One must, therefore, construe the rule as it stands. It is meant, no doubt, as a practical guide for seamen, to tell them their duty in circumstances to be observed from the bridge. It virtually states the reason for itself, namely, that the ship with a working tide with her has the right of way as against the ship coming the other way, because then the ship more likely to go large and less easy to control will be left free, and the other, with little way to take off, can be pulled up without delay or inconvenience, and leave her free water, in which to round the point. The give-way ship can then come on and if, on entering the tide stream from the slack

on rounding the point, she takes a slight sheer, it will not matter. This is how I read it. The ship is navigating against the tide, not against the tide table. The pilot, instead of having to keep one eye on the clock and the other on the tide table, can ascertain his duty by a glance from time to time over the ship's side. If there is, so to speak, a blind spot between the time when the tide runs up and the tide runs down, a period of really slack water, then at such time there is no need for any special regulation for navigating round the point, and the ordinary rule for ships meeting one another will suffice. One knows that in certain states of the wind, if they prevail for a considerable time together, the rise of the tide to high water may be substantially accelerated or retarded. If the rule were interpreted, so as to pay no regard to these occasions when navigation is in fact affected, it would be a rule confusing the conduct of ships rather than elucidating it.

Your Lordships having taken the opinion of your assessors on the question, were advised that even on the north side of the channel there would have been very little tide on the occasion in question, and on the south side, where the *Hontestroom* was, none at all. The Elder Brethren had already advised the learned President to the like effect. The configuration of this bend of the river appears to be a sufficient explanation of the differences in the conditions near the north and near the south bank. Under these circumstances I think the *Hontestroom* was not a vessel navigating against the tide and that r. 36 did not apply to her. No case has been made apart from this rule for holding her to blame for not waiting above the point till the *Sagaporack* had passed, for there was certainly room enough for both vessels to pass clear without difficulty port to port, if the *Sagaporack* had not misused her starboard helm. In my opinion the appeals should be allowed and the judgments of the learned President should be restored.

My Lords, I am requested to say that my noble and learned friends Viscount Dunedin and Lord Carson agree with the opinion I have just read.

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LORD PHILLIMORE. My Lords, I can state briefly my reasons for supporting the judgment of the Court of Appeal, in so far as it decides that the *Hontestroom* was to blame. When the *Hontestroom* was approaching Blackwall Point, the river just below the Point was encumbered by shipping. There was the *Durham Castle*, which had come out of the East India Dock on the north side of the river and was preparing to go down river, having already got some distance from the north shore but still being in the north water and waiting for an opportunity to get across to the south water.

There was the *Sagaporack*, a large vessel with two tugs, coming up the river, and there was a sailing barge which had come out from Bow Creek and was trying to work her way up river on the starboard tack, using a light breeze from a westerly direction and such upward drain of the flood tide as still existed, not of course making directly across the river, as then she would never have got up at all, but making an angle across and upward.

In these circumstances, the *Hontestroom* elected not to remain on her own side of the Point till some of these impediments had been cleared away, and thought she had made sufficient compliance with No. 36 of the Thames rules by easing before she got to the Point and proceeding at slow speed thereafter.

Thereupon she got the green light of the sailing barge fine on her port bow, recognized that she could not go ahead of the barge, and having the choice between stopping till the barge had drawn across her bows or of altering her course and passing under the barge's stern, elected the latter.

For this purpose she starboarded her helm and starboarded at a period when if she were to keep her course down the river at an even distance from the south bank she should have been under port helm.

The natural result of this was that she got away from the south shore, not indeed into the north water but to about 100 feet off mid channel, and this notwithstanding that as soon as she had got the barge across her bows, she did her

best to counteract her starboarding by the use of a port helm.

As it happened, for reasons which I will mention later on, that at that moment the *Sagaporack* had got into the south water, the collision happened at a comparatively slight angle between the two headings.

My Lords, under the Thames Rule No. 36 a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontestroom* did. She should also, if necessary, stop and wait before rounding so as to allow any vessel navigating with the tide, which it was said the *Sagaporack* was doing, to pass clear. This the *Hontestroom* did not do, and the collision happened.

It is said that the rule did not apply because the water was nearly slack; and the assessors who advised your Lordships agree with the Trinity Masters in the Admiralty Division so far that upon this side of the river, which is the important side, the tide was almost slack.

Having been long familiar with this rule, I have thought that its object was to prevent the simultaneous passing of a point by vessels, one bound up and the other down, if such simultaneous passing be dangerous, and that the expressions in the rule about navigating against or with the tide, were only inserted because, to prevent this simultaneous passing, one has to give way and the other to come on, and it was obvious which should be the one to give way.

I have thought that the rule was intended to apply almost continuously during the twenty-four hours. There may be a few minutes between tides when it is not possible to say that one is going more with the tide or more against the tide than the other; but the time of uncertainty must take a very short space, and it is true, as was observed by counsel in the course of the argument, that the greater the force of the tide, the more danger there is that a vessel making it will be deflected as her bow opens the point, and therefore the less the force of the tide, the less need for a rule.

In this case, I do not think that I am prevented by the opinion of the assessors from saying that there was still left

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sufficient tide (I agree with the noble and learned Lord, Lord Sumner, that there must be some tide) to indicate which of the two vessels, one bound down and the other up, should, if there were necessity, wait for the other, and that the *Hontestroom* recognized this when she eased her speed, and that she was the one which, if it were necessary, had to stop and wait.

My Lords, a witness in the course of the case tried to throw some ridicule upon the application of the rule by saying that, if he accepted that application, he would never get down the river. There is, of course, no such meaning in the rule. Vessels may constantly pass each other at a point. If the curve is gradual, if the channel is wide, if it is not encumbered by any navigation except the two vessels which are meeting each other, if the vessels are not of great size, perhaps with any one of these conditions, there is no danger of collision. Each vessel can keep in her proper water, and there is no necessity to stop and wait.

But Blackwall Point is, as I know the river, the point where there is the sharpest turn, one approaching to a hair-pin turn. The channel is not wide, and there is that which is the greatest danger of all, the crossing traffic coming out of the East India Docks or out of Bow Creek; and it was night.

The pilot of the *Hontestroom*, if he saw and appreciated the position of the *Durham Castle* and the approach of the *Sagaporack*, and if he did not see the light of the sailing barge, remembered that it was very likely that there would be a sailing barge there, took a serious responsibility when he came on.

But I do not invite your Lordships to find the *Hontestroom* to blame for this reason, because I do not think that it was the cause of the collision, though the facts of this case afford an excellent illustration of the value of the rule.

The cause of the collision, as far as the *Hontestroom* is concerned, was the starboarding for the barge instead of stopping to let it pass across. It is for this that I think the *Hontestroom* to blame.

It is said on her behalf that to hold this would be to reject

the conclusions of the President, who saw and believed the pilot of the *Hontestroom*.

My Lords, I accept the position in the river where the collision happened. I accept all the statements of the pilot as to his action with the engines, as to his action with his helm, as to the sequence of the lights which he saw; and I make no point against him on his statements as to the whistles which he heard and which he gave. Only I pack the orders more closely. I believe that when he starboarded for the barge, the *Sagaporack* was near him, and that he had not time to correct the starboard helm; and in this connection I would observe that it is agreed that the *Hontestroom* had not got down river as far as the barge when the collision happened. It was this starboarding with insufficient allowance for the difficulties of the approach of the *Sagaporack* for which I would hold the *Hontestroom* to blame, and in so doing I think that I follow the line of argument of Bankes L.J., and I intend to be in full concurrence with Scrutton L.J., who seems to have had the same picture of the scene before his mind that I have.

It is perhaps unfortunate that Bankes L.J. should have rested so much of his decision upon the apparent untruthfulness of the story of the *Hontestroom*. I agree entirely with him—and so, I think, do your Lordships—that the collision could not have been brought about on the story of the *Hontestroom* without a final porting by the *Sagaporack*; while the angle of the blow can be easily accounted for on the story of the *Sagaporack*.

But this final porting, though it did not appear in any of the plaintiffs' documents (and here I specially dwell upon the "preliminary act"), was spoken to by the witnesses and was not criticized as a complete change of story, and was accepted as a truthful statement by the President.

As I have said, I rest my judgment rather upon the admitted action of the *Hontestroom*, only believing that the critical act of starboarding took place when the vessels were nearer together than the *Hontestroom* says.

Now as regards the *Sagaporack*, I have more doubt. It

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was strongly urged that her speed was excessive. We have asked our assessors what would be an excessive speed for her, and on the answer which they gave, and the facts as they appear to me, and I think to all of your Lordships, her speed was not excessive. But her people overstated her case. They would have it that the collision occurred in the north water. The President has found—and it is now accepted—that it was 100 feet south of mid-channel. Her pilot said that she never starboarded. This can hardly be correct. She was, it is true, still below the Point; but, apart from anything else, if she were to keep her place in the river, she would have begun to starboard slightly, and to reach a position 100 feet south of mid-channel she must starboard somewhat more.

It was quite a natural and reasonable thing to do, so as to give the *Durham Castle* a fair berth, just as it was natural for the *Hontestroom* to starboard to go under the stern of the barge. But there was room for the *Sagaporack* to pass starboard to starboard with the *Durham Castle* without coming so much over to the south water. It may even be that she could have scraped through without crossing the mid-channel line; and if so, she would not have hampered the *Hontestroom*, and the starboarding by the latter, which was being corrected, would have been corrected in time. Though I think the *Hontestroom* most to blame, I think that the *Sagaporack* was also to blame, and on the whole I should vary the judgment of the Court of Appeal in this respect.

LORD BLANESBURGH, whose judgment was wholly concerned with the facts, was of opinion that the *Hontestroom* was alone to blame for both collisions. After an elaborate review of the evidence he reached the same conclusion as the Court of Appeal without invoking the aid of r. 36. With the assistance of that rule the case against the *Hontestroom* was, in his opinion, so much the stronger, for he was in accord on that subject with his noble and learned friend Lord Phillimore, whose judgment he had had the privilege of reading. In his opinion both appeals should be dismissed.

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On each appeal :—

Order of the Court of Appeal reversed and decree of the President restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 20, 1926.

Solicitors for the appellants : *Downing, Middleton & Lewis.*

Solicitors for the respondents, the *Sagaporack : Godfrey Warr & Co.*

Solicitors for the respondents, the *Durham Castle : Parker, Garrett & Co.*

[HOUSE OF LORDS.]

GARRALLAN COAL COMPANY, LIMITED APPELLANTS ; AND ANDERSON OR DEVLIN . . . . . RESPONDENT.

H. L. (Sc.)*

1926

July 27.

Workmen's Compensation—Arising out of and in the Course of the Employment —Breach of Mining Regulation—General Regulations dated July 10, 1913, *made under the Coal Mines Act*, 1911, *r.* 22—*Act done in Furtherance of Employer's Trade or Business—Onus of Proof—Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 7.

By reg. 22 of the General Regulations, dated July 10, 1913, made under the Coal Mines Act, 1911 : " No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such space unless the cages are stopped " :—

Held, that " stopped " referred to such a stoppage as was necessary for the safety of the men, i.e., a stoppage for the purposes of the work, and not to a casual stoppage in circumstances in which motion might be resumed at any moment and without notice.

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* *Present :* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD WRENBURY, and LORD BLANESBURGH.

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A miner employed as a pit bottomer in a mine where there was a shaft with two cages signalled the engineman to raise the cage on the "rise" side of the shaft from the shaft bottom, and the cage started. The ascent of this cage was automatically accompanied by the descent of the cage on the "dip" side of the shaft. When the latter cage had descended from the pithead to the surface level it was stopped, without the knowledge of the pit bottomer, in order to replace some empty hatches by hatches loaded with ashes, which were wanted at the pithead, and the cage was then raised to the pithead, with the result that the cage on the "rise" side of the shaft descended to the shaft bottom and killed the pit bottomer whilst attempting to cross the shaft bottom. At the time of the accident there was no evidence that the pit bottomer had any work to do at the shaft bottom. The arbitrator found that the act of the pit bottomer in attempting to cross the shaft bottom was a breach of reg. 22, and was not proved to have been done by him "for the purposes of and in connection with his employer's trade or business" within s. 7 of the Workmen's Compensation Act, 1923, and that the accident did not arise out of and in the course of his employment:—

Held, that there was evidence to support his conclusion.

Dictum of Fletcher Moulton L.J. in *Astley* v. *R. Evans & Co.* [1911] 1 K. B. 1036, 1044 discussed and distinguished.

Interlocutor of the Second Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland reversing the determination of the Sheriff-Substitute of Ayrshire sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The respondent, the widow of Peter Devlin, for herself and grandchildren claimed compensation from the appellants in respect of the death of her husband.

The facts appearing from the stated case and a supplementary statement made by the arbitrator in obedience to a remit by the Second Division were as follows:—

On November 24, 1924, Devlin was employed as a pit bottomer by the appellants on the night shift in their Garrallan Colliery. The Coal Mines Act, 1911, and the General Regulations dated July 10, 1913, made under that Act applied to the colliery, and were duly posted in terms of the Act.

Between 1 and 2 A.M. Devlin signalled the engineman at the surface (about 60 fathoms above the pit bottom) to raise the cage from the pit bottom on the "rise" portion of the

shaft, and the cage was raised from the bottom. The ascent of this cage was automatically accompanied by the descent of the cage on the "dip" side of the shaft, and in a normal journey there would have been an uninterrupted ascent and descent of the two cages until the ascending cage reached the pithead and the descending cage reached the shaft bottom on the "dip" side. On this occasion there were two empty hutches in the "dip" cage, and the pithead man took advantage of the "dip" cage being lowered to stop the cage at the surface for the purpose of leaving the empty hutches there and bringing back to the pithead two hutches filled with ashes from the engine at the surface. The pithead man signalled the engineman to stop the "dip" cage at the surface level and then ran down the stair from the pithead to the surface, took off the empty hutches and put on two hutches loaded with ashes. He then signalled the engineman to raise the "dip" cage with the two loaded hutches to the top of the shaft and went upstairs to the pithead to take them off. When the "dip" cage with the two empty hutches in it stopped at the surface the "rise" cage which had been signalled away by Devlin was suspended on the "rise" portion of the shaft at the same distance above the bottom as the "dip" cage had descended from the pithead, i.e., about 5 fathoms. When the "dip" cage with the two loaded hutches was raised from the surface to the pithead the suspended cage was lowered automatically to the pit bottom, and caused the accident hereinafter mentioned. When Devlin signalled the "rise" cage away he did not close the fence on either side of the shaft, as required by General Regulation No. 21 (*a*), and after the cage had been raised from the bottom he attempted to go on or across the uncovered space of the shaft bottom without signalling to have the cages stopped. In doing so he acted in contravention of General Regulation No. 22, which provides: "No person shall attempt to go on or across the uncovered space of the shaft bottom except for the purpose of working in the shaft bottom and no person shall be allowed to work in such space unless the cages are stopped." While Devlin was

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in the act of crossing the shaft bottom he was crushed by the descending cage and died on the following day. After the cage on the " rise " portion of the shaft had been raised from the bottom on the signal of Devlin he got no signal from either the pithead man or the engineman on the surface, and could not hear the signals given by the pithead man to the engine-man on the surface. He therefore had no knowledge in regard to the movement or stoppage of the cages immediately prior to the accident. The time which elapsed between the signal given by Devlin to raise the cage from the pit bottom on the " rise " portion of the shaft and the accident was sufficient for the cage on the " dip " portion of the shaft to reach the shaft bottom if no stoppage had taken place.

" (6.) No one witnessed the actual occurrence of the accident. At the pit bottom, on the one side of the shaft bottom, hereinafter called the ' empty ' side, the empty hutches are taken out of the cages by the pit bottomer and arranged for removal to the face, and on the other side of the shaft bottom, hereinafter called the ' load ' side, the loaded hutches are pushed into the empty cages by the pit bottomer after these hutches have been brought from the face. Two minutes before the accident James M'Kenzie, a stone worker underground, who was working at a road about 18 to 20 feet from the shaft bottom on the ' load ' side, came to the shaft and saw the said Peter Devlin on the ' empty ' side of the shaft distributing the empty hutches on two roads. The said James M'Kenzie returned to his own work, but on hearing an unusual sound like a deep gasp he ran back to the shaft, and found the said Peter Devlin lying in the shaft bottom close to the ' load ' side with the cage on the top of him. His left leg was beneath him and the right leg stretched out in front. This showed that at the time of the accident the said Peter Devlin had been crossing the shaft bottom from the ' empty ' to the ' load ' side.

" (7.) At the time of the accident there were no full hutches on the ' load ' side for the pit bottomer to prepare to put into the cage when it descended, and no loaded hutches were being brought forward from the face.

"(8.) The shaft bottom on which the cages rest when they descend is made of cement, and if bits of coal, stone or other debris fall down the shaft it is the duty of the pit bottomer to remove such debris from the shaft bottom. There was no evidence that at the time of the accident there was any such debris in the shaft bottom, and the attitude of the body of the said Peter Devlin after the accident was not consistent with his having been struck by the descending cage while he was bending to look for or pick up such debris.

"(9.) The act of the said Peter Devlin in attempting to go across the uncovered space of the shaft bottom before the cage was stopped is not proved to have been done by him 'for the purposes of and in connection with his employers' trade or business' in terms of section 7 of the Workmen's Compensation Act, 1923."

On these facts the arbitrator found in fact and law that the accident resulting in the death of Devlin did not arise out of and in the course of his employment by the appellants and he found in law that the respondent was not entitled to compensation from the appellants.

The questions of law stated by the arbitrator for the opinion of the Court were: (1.) On the evidence set forth in his findings of fact 1 to 8 was he entitled to reach the conclusion in fact stated by his ninth finding of fact? (2.) On the evidence above set forth was he entitled to find that the death of Devlin was not caused by accident arising out of and in the course of his employment by the appellants?

The Second Division (the Lord Justice-Clerk, Lord Anderson and Lord Ormidale) unanimously came to the conclusion that the deceased was in breach of reg. 22, and that apart from the Act of 1923 he would not have been doing work within the sphere of his employment, but the majority (the Lord Justice-Clerk dissenting) were of opinion on the evidence that the deceased "was still about his employers' business within the meaning of s. 7 of the Act of 1923."

1926. July 26, 27. *John Carmont K.C.* (with him *Albert Russell*) (both of the Scottish Bar) for the appellants. The

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arbitrator's decision on the facts is final if there is any evidence to support it or unless he proceeded on an error of law: *John Watson, Ld.* v. *Brown.* (1) In this case the facts proved disclose sufficient grounds to justify the conclusion of the arbitrator.

Fenton K.C. and *W. D. Patrick* (both of the Scottish Bar) for the respondent. There was here no breach of reg. 22. It is for the appellants to prove that the regulation applies. The arbitrator apparently based his refusal of compensation upon the second part of the regulation. But the prohibition contained in the words "no person shall be allowed" is directed not against the workman but against his employers, and contemplates the issue of particular instructions by the employers to their workmen. Assuming that the regulation applied to the deceased, he did not act in breach thereof, in respect that on the occasion in question the cages had de facto been stopped. There is nothing in the language of the regulation to qualify the ordinary and popular meaning of the word "stopped," or to warrant the conclusion that the regulation refers to some special stoppage accompanied by some formality or signal which would ensure that the cages would not be restarted until the men at work in the shaft bottom were clear thereof. Assuming that the deceased was in breach, the contravention did not take him outside his employment. The area of his employment as pit bottomer was the whole of the shaft bottom, and, at most, his act in going upon the uncovered space without signalling to prevent the cages being moved amounted to a breach of a prohibition regulating his conduct within the sphere of his employment: *Estler Bros.* v. *Phillips.* (2) *Whiddart* v. *Chislet Colliery Co.* (3) is opposed to the respondent's contention, but that was a decision of the Court of Appeal, and it cannot stand with the subsequent decision of this House in *Estler.*

[VISCOUNT DUNEDIN referred to his statement of the law in *Conway* v. *Pumpherston Oil Co.* (4)]

(1) [1925] S. L. T. 569; 18 B. W. C. C. 419.
(2) (1922) 15 B. W. C. C. 291.
(3) (1920) 13 B. W. C. C. 157.
(4) 1911 S. C. 660; 4 B. W. C. C. 392.

There remains the question what is the effect of s. 7 of the Act of 1923 ? Did the deceased cross the pit bottom for the purposes of and in connection with his employer's trade or business ? This being a place where the deceased had duties to perform, if there are no facts which establish that this act was done for his own purposes, the respondent is entitled to pray in aid the presumption laid down by Fletcher Moulton L.J. in *Astley* v. *R. Evans & Co.* (1) : " Where the workman is shown to have been engaged in his employer's work and nothing else during the period prior to the accident, and the accident occurs by reason of his doing an act which is consistent with his still continuing to be doing that work, the proper presumption is that he did what led to the accident in continuing his employer's work, and not that he had ceased to do his employer's work and had commenced to do something for his own purposes. In other words, where the workman is engaged in his employer's work up to his death and the last acts known are consistent with the continuance of that work, the onus is upon the person who alleges a cessation of his work for his employer, to prove it." The arbitrator has misdirected himself on the question of onus, there being here no single fact indicating that the man had left his employer's business.

VISCOUNT DUNEDIN. My Lords, the learned counsel for the respondent have, I think, really said all that possibly can be said for her case, but I cannot say that they have for one moment dislodged the opinion to which I came some time ago, that the judgment of the Lord Justice Clerk in this case is right and the judgment of the majority wrong.

This unfortunate accident, by which this man lost his life, happened in this way : He was a pit bottomer, and, in accordance with very ordinary arrangements in a pit, there was a shaft and two cages, the cages being, of course, suspended by a rope going over a wheel at the top of the pithead, one cage being at the top and the other at the bottom, and, alternately, as one cage was sent up the other cage

(1) [1911] 1 K. B. 1036, 1044.

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automatically came down. The one side of the pit bottom was used for the loading of coal which came from the face, and then the empty trucks were sent down in the other cage. As a pit bottomer his business was to put the loaded trucks into the cage and take out the empty trucks from the cage that came down. He had put in loaded trucks at the loading side and he had signalled for that cage to go to the top, and the cage started. After the cage started he went to the empty side to arrange some of the empty trucks; this is spoken to by a man who was working at a stone face not very far away and who saw him thus engaged. The next thing that happens is that he is found crushed under the cage which he had dispatched from the loaded side. The way in which that happened was this: As the cage on the loaded side which he started went up, of course the empty cage began to descend from the pithead. Now, the pithead is 25 feet above the surface level for a very ordinary purpose—namely, to have the advantage of that height to send loaded trucks down an incline. When the descending cage reached the surface level the persons in charge there had something which they wanted to send up again to the pithead, so, instead of letting the whole operation go on, they stopped the engine when the descending cage arrived at the surface level, and then, instead of allowing it to go down, as the ordinary operation would have done, they sent it up again to the top. That, of course, sent back the cage which had been started at the loaded side, and it returned, no doubt, absolutely unexpectedly by this poor man, and he, being in the territory in which it was, it crushed him. The question therefore is: Did that accident arise out of and in the course of his employment, and can his dependants recover?

Now, there is a regulation which deals with the state of affairs at the bottom, and that is reg. 22, which provides: "No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such space unless the cages are stopped." We had some exceedingly ingenious argument upon the precise phraseology

of this regulation and where the commas are placed. I am not going through it, because I am going to take the regulation as it stands according to the ordinary meaning of common sense, which is what it is put there for. Nobody doubts what that regulation is for. It is in order to keep people out of the place where they can be crushed to death, and it says you are not to go to the shaft bottom—I do not draw any distinction between the uncovered space of the shaft bottom and the shaft bottom itself—except for the purpose of working, and you are not to work, and not to go on for the purpose of working, unless the cages are stopped. There can be no question in common sense that "stopped" there does not mean momentarily stopped, but really stopped for the purpose of work going on. I do not think it matters whether there is a telegraph or not, because if there were something really to be done to the pit bottom there would be no difficulty in sending a message up to the engine and saying: "The engines are to be stopped until we have got this thing done." Accordingly, the regulation applies. Now I have no hesitation—and, indeed, here all the learned judges, including the arbitrator, have come to the same conclusion —that that is a prohibition which limited the scope of the employment. He was going into a territory where he had no business to go except under certain conditions. I need not go again into the oft-quoted case of *Plumb* v. *Cobden Flour Mills Co.* (1) and all the cases which followed, because all the judges are agreed as to that. That being so, it is quite clear that if it had not been for the recent Act he could not have recovered, because the accident would not have been arising out of his employment.

But then comes the recent Act, 1923, and that Act says (s. 7) that the accident shall be deemed to arise out of the employment "notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation . . . . if such act was done by the workman for the purposes of and in connection with his employer's trade or business." There is no question,

(1) [1914] A. C. 62.

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therefore, that it falls within the Act, only you must prove it was done in contemplation and furtherance of his employer's business. It is clear that there the onus is upon the workman, and the question is: Has he discharged that onus? Here I come back to the learned arbitrator, because, of course, the question whether he has discharged that onus is a question of fact and nothing else. What the learned arbitrator says is this: After saying that no one witnessed the accident, but that from the position of the body he came to the conclusion that he had been crossing from the empty side back to the loaded side, where, no doubt, poor man, he had thought he would have been quite safe, and would have been quite safe if it had not been for the manœuvring at the pit-head, he then puts the two findings: "At the time of the accident there were no full hutches on the 'load' side for the pit bottomer to prepare to put into the cage when it descended, and no loaded hutches were being brought forward from the face"—in other words, he had nothing particular to do on the loaded side. "The shaft bottom on which the cages rest when they descend is made of cement, and if bits of coal, stone, or other debris fall down the shaft it is the duty of the pit bottomer to remove such debris from the shaft bottom. There was no evidence that at the time of the accident there was any such debris in the shaft bottom, and the attitude of the body of the said Peter Devlin after the accident was not consistent with his having been struck by the descending cage while he was bending to look for or pick up such debris." Now, those are two findings of fact, and upon that he has this finding, which is, of course, a finding in law based on the facts: "The act of the said Peter Devlin in attempting to go across the uncovered space of the shaft bottom before the cage was stopped is not proved to have been done by him 'for the purposes of and in connection with his employers' trade or business' in terms of section 7 of the Workmen's Compensation Act, 1923." What your Lordships have to say, if the opinion of the majority was right, is that that is a conclusion which no reasonable man could come to upon the facts which he had previously found.

Really, I should only be wasting your Lordships' time if I said over again what has been said so often in this House in the case of *John Watson, Ld.* v. *Brown* (1) and *Mackinnon* v. *Miller* (2), where, no doubt, several dicta were my own, but they were entirely approved of by the other learned Lords, and there were dicta by both Lord Loreburn and Lord Shaw to the same effect; therefore I do not take up your Lordships' time by going into that. There is no question that that is the criterion. It is not for us to consider what conclusion we should have come to. All we have to say is: Was the conclusion that the arbitrator came to a conclusion which no reasonable man could reach? I find it for myself perfectly impossible to say so, and therefore I think that the arbitrator's finding and decision ought not to have been interfered with.

A good deal was said about a certain presumption which Fletcher Moulton L.J. laid down in the case of *Astley* (3)—a case long before this Act. That was a case arising simply upon the old question of whether an accident arose out of and in the course of a man's employment, and what Fletcher Moulton L.J. said there was this: "If a man is engaged in his employer's work and you know nothing more till you find the accident and nothing particular has happened in the meantime, and he is still in a place where he might well be working at the work which you knew he was engaged on when the last practical testimony was given, then there is a presumption that he was engaged in that work at the time of the accident." My Lords, that has obviously no application to a case where ex hypothesi—because one must take it ex hypothesi—the man was in a prohibited territory, that is to say, out of the sphere of his employment.

Therefore, my Lords, upon the whole matter I move your Lordships that the appeal be allowed, and that the decision of the learned arbitrator be restored.

LORD SHAW OF DUNFERMLINE. My Lords, I feel loth to add anything to the speech just delivered, with which I so

(1) [1925] S. L. T. 569; 18 B. W. C. C. 419.
(2) 1909 S. C. 373.
(3) [1911] 1 K. B. 1036.

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entirely concur, but your Lordships will suffer me to make these three propositions.

As to reg. 22, which is printed in the case and which your Lordship has read, I view the regulation simply to come to this, that when cages are in motion the land under these cages is forbidden territory. Being forbidden territory, on ordinary principles it would be held, and in accordance with frequent authority, that the accident could not be described as arising out of the employment, or even in the course of it.

The second matter I would refer to is s. 7 of the Act of 1923. That section provides that even although there be a statute or a regulation or order expressly forbidding the entering of that forbidden territory, yet, if the act was done for the purpose of and in connection with the employer's trade or business, the man, so to speak, shall stand excused and the beneficent provisions of the Act shall come into play. My Lords, on a sound construction of s. 7 I have no doubt that the onus of establishing that excuse rests upon the workman putting it forward.

The third point seems to me to be past praying for; it has reference to the action of the arbitrator in this case. We have said in this House, till we are tired of saying it, that the very greatest deference must be paid to the arbitrator as the entire judge of fact. In this case I wish to say pretty emphatically that we have to review arbitrators' findings not infrequently in this House, but in the present instance I see no fault in or occasion to quarrel in any particular with the admirable statement which the arbitrator here has made.

My Lords, after the cases of *Watson* (1) and *Mackinnon* (2), which have been cited in the discussion, it is altogether too late in the day to suggest that we can stand confronted with these facts as if we were judges of them. In this case, had the arbitrator come to a different conclusion on evidence mostly circumstantial, I should not have dreamt of differing from him; but whether his verdict was on the one side or on the other, this House is in the habit of going to the same side.

It is here purely fanciful to suggest, in the phrase now in

(1) 18 B. W. C. C. 419. (2) 1909 S. C. 373.

common use, that the arbitrator misdirected himself. The meaning of that simply is that he allowed his mind to be deflected from a true inference on fact by reason of making an error in law. Nothing in the case warrants such a notion.

LORD SUMNER. My Lords, I concur. On the first point, the one debated in the Court of Session, I agree with the dissentient opinion of the Lord Justice Clerk. It is said that, as the deceased was killed, it must be presumed that he was continuing to do something, down to the time when he was struck by the cage, which it would be his duty to his master to do, and for that the authority of Fletcher Moulton L.J. in *Astley's* case (1) is cited. It is not necessary to say whether that is a presumption that your Lordships should think fit to affirm or not. It appears to me to be inapplicable here. As my noble friend on the Woolsack has pointed out, the Lord Justice spoke with reference to acting in the course of the employment—not with reference to acting for the purpose of the employer's business—and it is quite plain, I think from the passage at the top of p. 1045 in the report, that what he thought might be presumed in favour of a deceased man was that he continued to go on with the job he was employed on and did whatever led to his death for the purpose of that job and not for the purpose of any other of his various duties to his master. What he says is that he sees nothing in the man's getting on to the brake van which would be inconsistent with his intending to do the next act which he had to do—namely, to get out and go to the points and open them. That was why he presumed that a man, who fell down in getting on to the brake van and was killed, was getting on to the brake van in the course of his employment and not for any purpose of his own. My Lords, in this case I do not think that such a presumption, even if it were applicable, assists the applicant. If the person injured, instead of being killed had been only seriously and permanently disabled, but had been able to give evidence and had refrained from doing so, no one would have suggested, I think, that a presumption

(1) [1911] 1 K. B. 1036.

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as to what he must have been intending to do could help him over the fact that he knew what he intended to do and declined to say. I do not see that there can be any presumption with regard to s. 7 of the Act of 1923 in favour of a man who is killed, unless it would be equally applicable to the other case provided for in that section, of a man seriously and permanently disabled. It is a presumption of fact. It must be one as to what the workman was likely to be doing and such as would arise apart from the Act, for the Act itself provides for none. It must rest upon the presumption that a good workman will be faithful to his employer and will do his duty during his hours of work. Now in this case we know, subject to the point about the construction of reg. 22, that in respect of going into this space when the cage was not stopped he was not faithfully discharging his duty to his employer, because it clearly is a part of the man's duty to his employer to observe the regulations, which are provided for his own safety and for the protection of the employer from claims of this kind. It seems to me, therefore, that, presumption not assisting the applicant, the material was abundant to justify the arbitrator's conclusion. There was the evidence that the man had gone into what is called the uncovered space—that is to say, the space discovered by the rise of the cage—without the cages having been stopped. It was suggested that he might have descried some debris, have gone in to clear it away, have thrown it out where it would not be noticed, and have been caught as he was leaving the uncovered space. There was no evidence that there was any debris for him to remove when he got there ; there was no evidence that he had anything to do in the way of either marshalling empty hutches or preparing empty hutches to be loaded later on ; and there was no evidence that he had anything to do at all until the cage came down again. That kind of consideration was for the learned arbitrator. He had ample material upon which to say that, apart from presumption, it was not shown that the deceased was in the place, where he was at the time of his injury, for the purposes of and in connection with his employer's trade or business.

That, as the matter stood in the Court below, would have concluded the case, but, my Lords, necessity has been the mother of invention and has led to an argument upon the true construction of reg. 22 so ingenious and refined that I have found in it a pleasure which I never recollect experiencing in this dismal class of case before. It is pointed out with perfect justice that the language of this regulation varies where one would not expect it to vary; that it begins by speaking of a person attempting to go on or across the uncovered space, and it ends by speaking of a person being allowed to work in such space. It therefore may be said to draw a distinction between going on and going across, which I take it is a distinction between going on and then going back and going right across and not going back, and that we ought to have careful regard to that difference. The result would be that the pit-bottom man, whose duty it is or may be to work in the shaft bottom, is a person exempted from the prohibition against going on or across the uncovered space, when he is doing so for the purpose of working in the shaft bottom—that is, in any part of the shaft bottom. There is a separate prohibition against any person being allowed to work, which may be a prohibition to the officials against letting any one else go on but not a prohibition to a workman against permitting himself to be so rash as to go into such a place unless the cages are stopped. My Lords, no regulation, I suppose, is insusceptible of a construction which would reduce it to a nullity and make it, as this would, a trap instead of a safeguard, because regulations are framed not only to be read but to be understood by the unlearned, and the phraseology of the learned may be ill adapted to other intelligences. It seems to me, however, to be clear that the regulation is to be read as a whole. The cage must not only reasonably seem to be stopped, but must be stopped before any person is to be allowed, by himself or by others, to work in such space, even though he be the pit-bottom man himself. "Stopped" means such stoppage as is necessary to secure the safety of the workmen—that is to say, stopped for the purpose of the work and not merely stopped under circumstances

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in which motion may be resumed without notice and at any moment. The uncovered space is barred to every person except for the purpose of working in the shaft bottom or in that part of the bottom, and, even to a man going in for such purpose, it is barred unless the cages are stopped in the above mentioned sense. Now in this case it is quite clear that the deceased must have known that there had been no stoppage for the purpose of giving him an opportunity of working in the uncovered space. He knew that the down-cage had not arrived ; he did not know why it had not arrived. He therefore knew that the proceeding, for which he had signalled and which had been begun, had for some unknown reason temporarily stopped, but had not been completed. It seems to me, therefore, that, as far as the state of the deceased's mind is concerned, it was reasonable for the learned arbitrator to suppose that he had warning that the regulation applied at that time, and that, if he proposed to work in that space, the time had not come for him to begin such work. I certainly cannot read the regulation to mean that, provided he is a man employed to work and is intending to work, it leaves him free to go in and out or on or across to any extent, whether the cages are stopped or not. I therefore cannot escape the conclusion, after giving it all the attention in favour of the respondent that I can, that there has been a clear case of breach of the regulation, which is destructive of any presumption and also prevents any shifting to the employer of the onus, which otherwise would rest upon the workman, of bringing himself within the last words of s. 7, so as to have the benefit of the extension in the Act of 1923.

LORD WRENBURY. My Lords, I agree. The case to my mind falls within a small compass. The man was killed. When he was killed he was acting in breach of a statutory regulation. But, having regard to s. 7 of the Act of 1923, that is, so far, no defence to the dependants' claim to compensation. The fact that he was acting in breach of a regulation, however, calls into action the last words of s. 7. The whole case, I think, turns upon those words. Sect. 7 provides

that when the event happens which happened in this case, the accident shall be deemed to arise out of and in the course of the employment, notwithstanding that the man was acting in breach of a regulation. So far so good; all that is satisfied. But the onus is upon him to prove that, the facts being such as I have stated, he was acting at the moment "for the purposes of and in connection with his employer's trade or business." With that in mind I turn to the arbitrator's findings, and I find in the eighth and ninth findings that it was the duty of this man to remove debris from the shaft bottom, but there was no evidence that at the time of the accident there was any such debris. He therefore finds adversely to him that there was no occasion to perform a duty which, if circumstances had been otherwise, would have been a duty, and therefore that he was not there for any duty. Then in the ninth finding he finds that the act of the man in attempting to go across the uncovered space of the shaft bottom before the cage was stopped is not proved to have been done by him for the purposes of and in connection with his employer's trade or business. He finds that there is no evidence that the duty had arisen, and he finds that there was no evidence that he was there for the purposes of and in connection with the employer's trade or business. Upon both of those matters it is not for us to review the arbitrator; we are to act upon his findings. It appears to me that on those findings he has found that the last words of s. 7 are not satisfied, and therefore the claim of the dependants must fail.

LORD BLANESBURGH. My Lords, I agree.

Interlocutor of the Second Division of the Court of Session in Scotland reversed, and cause remitted back to the Court of Session, with a direction to answer the questions of law in the affirmative, and to restore the determination of the Sheriff-Substitute and remit to him to proceed as accords and to do therein

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as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, July 27, 1926.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *John Kennedy & Co., for M'Millan & Howie, Ayr, and Macpherson & Mackay, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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BIDDULPH AND DISTRICT AGRICULTURAL SOCIETY, LIMITED . . . } APPELLANTS;

AND

AGRICULTURAL WHOLESALE SOCIETY, LIMITED . . . . . } RESPONDENTS.

Industrial Society—Rules—Ultra vires—Alteration of Rules—Collateral Obligation upon Members to take further Shares—Limitation of Liability to contribute—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *ss.* 22, 60.

In 1914 the B. industrial society became a member of the A. industrial society, and in accordance with the rules of the latter society took up two shares, being one share for each fifty of its members. By virtue of an alteration of the rules of the A. society made in 1918 the B. society, as a member of the A. society, became bound forthwith to take up additional shares in the A. society sufficient to make up its holding to one share for each member with additional shares in respect of its turnover, and also thereafter to take up further shares representing any increase in membership and turnover during the past financial year. In 1918 the B. society took up the requisite number of additional shares in the A. society, but subsequently refused to take up any further shares as required by the altered rules:—

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* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD BLANESBURGH.

Held, that the B. society, having taken up additional shares on the basis of the altered rule, were by virtue of s. 22 of the Industrial and Provident Societies Act, 1893, bound as by a covenant under seal to take up the further shares required by that rule, and that this collateral obligation did not offend against the provision in s. 60 limiting the liability of members of an industrial society to contribute in the winding up to the amount unpaid on their shares.

Quaere whether, having regard to the terms of the Act, an alteration of the rules of a registered society requiring the members to subscribe for additional shares would be binding on a member who had not assented to the alteration.

Dibble v. *Wilts and Somerset Farmers* [1923] 1 Ch. 342, so far as inconsistent with the judgment of the House of Lords, overruled.

Decision of the Court of Appeal [1925] Ch. 769 affirmed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Sargant L.JJ.). (1)

The following statement is taken from the opinion of the Lord Chancellor :—

The respondent society was registered on September 14, 1914, under the Industrial and Provident Societies Act, 1893, under the name of the Farmers' Central Trading Board, Ld., but subsequently changed its name to the Agricultural Wholesale Society, Ld. The original rules of the respondent society included the rules following :—

"Rule 9.—Shares to be held by members. Each society or company which is a member shall hold at least one share for each 50 (or fraction of 50) of its members.

Rule 59.—Mode of amending rules.—The rules may be amended by resolution of a three-fourths majority at a special general meeting. No amendment of rules is valid until registered."

In the month of November, 1914, the appellant society (which is also a co-operative society registered under the Act of 1893) became a member of the respondent society and (having then between 50 and 100 members) took up, in accordance with the rules of the latter society, two shares in that society of 1*l.* each.

By a resolution passed by the requisite majority at special general meetings of the respondent society held on May 1

(1) [1925] Ch. 769.

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and 16, 1918, the respondent society amended its rules. The rules as so amended included the following provisions :—

"Rule 6. Conditions of membership.—(*a*) Every existing member shall, within three calendar months after June 1, 1918, take up such a number of shares in the A.W.S. as together with the existing shares of such member in the A.W.S. will make up the number of shares which such society, if a new member, would have had to take up.

(*b*) Every society or company (not being an allotment society) hereafter admitted to membership, shall take up at least one share of 1*l.* in the A.W.S. for each member of such society or company and additional shares of an amount taken at the par value thereof equal to 2 per cent. on its turnover as below defined.

* * * * * *

(*d*) For the purposes of this rule the following provisions shall apply :—

* * * * * *

5. Every such society or company shall within six months after the end of each financial year of such society or company apply for and take up such further shares as shall represent any increase in membership and turnover over that on which its then present holding of shares shall have been calculated."

The effect of this alteration of rules was that the appellant society as a member of the respondent society became bound forthwith to take up additional shares in the respondent society sufficient to make up its holding to one share for each member of the appellant society with additional shares in respect of its turnover as defined in the rules, and also thereafter, within six months after the end of each of its financial years, to take up further shares representing any increase in membership and turnover during that year.

By a letter dated August 12, 1918, the respondent society brought this alteration of rules to the notice of the appellant society ; and the appellant society thereupon by letter dated August 20 asked for an estimate of the number of shares for which it was liable, and on being informed that it was

liable to take up additional shares sufficient to make up its holding to 472 shares, duly applied to the respondent society for the additional 470 shares required for that purpose. These shares were accordingly issued to the appellant society, which duly accepted the same and paid up the amounts payable on the shares.

The membership and turnover of the appellant society increased from year to year, and it is not disputed that at the end of the year 1921 it was the duty of the appellants—assuming them to be bound by the rules of 1918—to take up 2211 additional shares, making up their total holding to 2683 shares.

In the year 1922 further alterations were made in the rules of the respondent society; but as the respondents' claim is not founded on the rules as so altered, it is unnecessary to set out the alterations in detail. It is enough to say that the rules did not increase the liability of the appellants to take up additional shares.

In the month of October, 1923, the board of the respondent society called upon the appellants to take up the additional 2211 shares in accordance with the rules of 1918, and ultimately allotted such shares to the appellants. This allotment being disputed, the respondents commenced this action against the appellants, claiming a declaration that the appellants were liable to take up and pay for the additional 2211 shares and payment of the amount due on such shares. The action came before Lawrence J., who held, on the authority of his previous decision in *Dibble* v. *Wilts and Somerset Farmers* (1), that the appellants were not liable to take up the additional shares; but on appeal to the Court of Appeal that Court reversed the decision of the learned judge and gave judgment in favour of the respondents. Hence the present appeal.

1926. June 8, 10. *Clauson K.C.* (with him *H. S. G. Buckmaster*) for the appellants. The question is whether an industrial society can by its rules require a shareholder

(1) [1923] 1 Ch. 342.

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by reason of his holding to take up further shares. It is repugnant to the principles affecting the liability of members —principles which are applicable alike to limited companies and to industrial societies: Companies (Consolidation) Act, 1908, s. 123, sub-s. 1 (iv.); Industrial and Provident Societies Act, 1893, s. 60 (*d*)—that a member should be forced by the articles or rules of the company or society to contribute anything beyond the amount of the shares which he has taken; and in substance there is no difference between seeking to make a member liable to pay more than the nominal amount of the shares of which he is the holder and seeking to compel him to acquire additional shares: *Ooregum Gold Mining Co. of India* v. *Roper* (1); *Manners* v. *St. David's Gold and Copper Mines* (2); *Bisgood* v. *Henderson's Transvaal Estates.* (3) That was the view taken by Lawrence J. in *Dibble* v. *Wilts and Somerset Farmers* (4), which governs this case. The Court of Appeal have held that an obligation imposed on members by the rules is enforceable against them, even though it be an obligation to increase their contribution to the society; but the cases relied on in support of that proposition are distinguishable. In the cases relating to mutual insurance companies—*Lion Insurance Association* v. *Tucker* (5) and *Baird's Case* (6)—where by the memorandum and articles of association a member became both an assured and an insurer between himself and other members of the same class, it was held that a member might be bound thereby to contribute to losses beyond the amount of his statutory liability as a condition of himself being indemnified against his own losses, but these decisions turned upon the peculiar constitution of that class of company, and in the present case there is no such corresponding advantage accruing to the shareholder. The director's qualification cases—*Ex parte Lord Inchiquin* (7) and *Isaacs' Case* (8)—turned upon the duty of the director to qualify,

(1) [1892] A. C. 125.
(2) [1904] 2 Ch. 593.
(3) [1908] 1 Ch. 743.
(4) [1923] 1 Ch. 342.
(5) (1883) 12 Q. B. D. 176.
(6) [1899] 2 Ch. 593.
(7) [1891] 3 Ch. 28.
(8) [1892] 2 Ch. 158.

and the shares were deemed to have been taken in pursuance of that duty. In those cases the director knew or had the means of knowing at the outset the limit of his liability. But if the decision of the Court of Appeal stands there is no limit to the liability which may be imposed upon the shareholders. In *Peninsular Co.* v. *Fleming* (1) it was held that shareholders might be bound by the articles of association to advance money to the company by way of loan. But in none of these cases was the obligation imposed by an alteration in the articles, and *Baily* v. *British Equitable Assurance Co.* (2) is opposed to this view. The liability of the appellants was incurred at the time when they became members, at which time there was no obligation upon them to take these additional shares, and that liability cannot be increased by an alteration in the rules. If a shareholder can be called on from time to time to take further shares a further liability of an indefinite amount beyond the statutory liability to contribute may be placed in invitum upon any shareholder. The principle that the rules as altered from time to time are binding on the members is subject to this limitation, that the alterations must be within the scope of the Act.

[He also referred to *McKewan's Case.* (3)]

W. A. Greene K.C. (with him *Valentine Holmes*) for the respondents. The appellants at the time of taking their shares were, on the facts, fully alive to the nature of their liability. The respondents are proceeding solely on the rules of 1918. The making of a rule imposing upon a member the obligation, in events entirely within his own volition, to take up further shares in the company, is open to no objection. An obligation to take up further shares is not equivalent to an obligation to contribute in the winding up of the company. As to the alteration of the rules: In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* (4) Lord Finlay treated the alteration as valid, apart from its being in restraint of trade. He said:

(1) (1871–2) 27 L. T. 93.
(2) [1904] 1 Ch. 374; [1906] A. C. 35.
(3) (1877) 6 Ch. D. 447.
(4) [1919] A. C. 548, 570–1.

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"When once the alteration has been effected the question must be whether the rule is or is not ultra vires, and this must be determined apart from the question whether any particular member concerned has or has not assented to the rule." The House there held that the rule was invalid, not on the ground of its being a new rule, but on the ground of public policy. Then is there any statutory or other objection to a rule of this kind in a society of this kind? Common law invalidity is not suggested. The only statutory objection suggested is that this rule violates the principles of limited liability. That depends upon ss. 22 and 60 (*d*) of the Industrial and Provident Societies Act, 1893. A rule imposing a liability on members to take further shares is not a rule which requires from them any contribution exceeding the amount unpaid on the shares which they hold. There is a danger in applying to industrial societies decisions upon limited companies, because the Acts by which they are regulated are very different. But even in the case of a limited company the articles of association are not necessarily invalid because they bind the shareholders as individuals in certain events to pay money to the company beyond their statutory liability to contribute. *Baird's Case* (1) illustrates the difference between this liability and contribution. The appellants' contention can only be supported on the hypothesis that *Peninsular Co.* v. *Fleming* (2) and the other authorities relied upon by the Court of Appeal were wrongly decided.

[He also referred to *United Kingdom Mutual Steamship Assurance Association* v. *Nevill.* (3)]

Clauson K.C. replied.

The House took time for consideration.

1926. July 29. VISCOUNT CAVE L.C. My Lords, the real question arising in this action is whether the appellant society, a shareholder in the respondent society, is or is not bound by contract to take up additional shares in that

(1) [1899] 2 Ch. 593. (2) 27 L. T. 93.
(3) (1887) 19 Q. B. D. 110.

society. [The Lord Chancellor stated the facts as above.] It was argued on behalf of the appellants that a decision that they were bound by the rules, as altered in 1918, to take up and pay for the additional 2211 shares would be inconsistent with the provisions of the Act of 1893, which permits an industrial and provident society to be registered with limited liability, and in particular with s. 60 of that Act, which provides that, where a registered society is wound up, the liability of a present or past member of the society to contribute for payment of the debts and liabilities of the society, the expenses of winding up and the adjustment of the rights of contributors among themselves shall be qualified by the following among other provisions: "(*d*) No contribution shall be required from any individual, society or company exceeding the amount (if any) unpaid on the shares in respect of which he or it is liable as a past or present member." It was further argued that such a decision, if applied to a company registered under the Companies Act, might effect a serious inroad upon the principle of limited liability established by that Act. To this it was answered that there was no question in this case of imposing upon a member of the respondent society any liability to make a contribution in a winding up, and that the only question to be determined was whether the appellants, having accepted the rules of the respondent society as altered in the year 1918 and taken shares upon the footing of those rules, could now dispute their liability to take up additional shares in accordance with those rules. Reference was also made to s. 22 of the Act of 1893, which provides that "the rules of a registered society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators and assigns, to conform thereto, subject to the provisions of this Act."

My Lords, in my opinion the contention of the respondents, which has been accepted by the Court of Appeal, is right,

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Viscount Cave L.C.

and the appellants are under a contractual obligation to take up the additional 2211 shares. It is unnecessary for the purposes of this appeal to decide whether, having regard to the terms of the Industrial and Provident Societies Act, 1893, an alteration of the rules of a registered society requiring the members of the society to subscribe for additional shares would be binding on a member who had not assented to the alteration; for the case of the respondents rests, not on any alteration of rules made after the appellants took up their shares, but on the rules of 1918, which were in force when the appellants subscribed for 470 shares. Still less is it necessary to determine whether in the case of a company registered with limited liability under the Companies Act a shareholder could be called upon in consequence of any alteration of the articles of association to take up additional shares; for the provisions of the Industrial and Provident Societies Act differ in many respects from those contained in the Companies Act, and great caution is required in applying to one of those statutes a decision as to the construction and effect of the other. The respondents' case rests on contract only. The appellants when they took the 470 shares on the basis of the rules of 1918—and the correspondence shows beyond any doubt that they did so—became by virtue of s. 22 of the Act of 1893 bound as by a covenant under seal to take further shares in accordance with the provisions of those rules; and there is nothing in the Act of 1893 or to be inferred from that enactment which invalidates such a covenant. No doubt s. 60 of the Act protects a member from being made liable in a winding up of the society to contribute more than the amount unpaid in respect of his shares; but the appellants are not required to make any such contribution, but only to take up additional shares in accordance with the collateral agreement into which they have entered. The difference, as Warrington L.J. pointed out, is one not of form but of substance, for reasons which he gave in the following extract from his judgment (1): "What the Act prohibits is the exaction from a member,

(1) [1925] Ch. 769, 787.

present or past, as a contribution in the case of a winding up of more than the amount unpaid in respect of his shares as such member. Now supposing this member in question had taken up the shares which by the rules it was bound to take up; it would have been entitled to that limit, it would still have been liable only as a present member to contribute to the debts and liabilities to the extent of the amount unpaid in respect of its shares. The obligation which it is sought to enforce here is not an obligation binding the defendant society to pay more than that statutory limit, but it is a collateral obligation binding it to the plaintiff society to become the owner of further shares in respect of which it may be called upon to contribute and in respect of which contributions it will be entitled to the same limit as it was entitled to in respect of its former shares." I find myself in entire agreement with the opinion so expressed.

My Lords, having regard to the view which I hold as to the nature of the case, it is unnecessary to refer at length to the authorities which were cited. I agree with the learned judges of the Court of Appeal in holding that the cases mainly relied upon by the appellants (such as *Ooregum Gold Mining Co. of India* v. *Roper* (1); *Welton* v. *Saffery* (2); *Manners* v. *St. David's Gold and Copper Mines* (3); and *Bisgood* v. *Henderson's Transvaal Estates* (4)) have no real bearing upon this case; and that the authorities which bear the closest analogy to the present case are those in which it has been held that a collateral obligation entered into by a member of a company in the rules or articles of association may be enforced against him: see for instance *Peninsular Co.* v. *Fleming* (5); *McKewan's Case* (6); *Lion Insurance Association* v. *Tucker* (7); and *Isaacs' Case.* (8) The difference between the liability of a member to contribute in respect of his shares and his liability on a collateral contract was emphasized by Wright J. in *Baird's Case* (9) and was fully

(1) [1892] A. C. 125.
(2) [1897] A. C. 299.
(3) [1904] 2 Ch. 593.
(4) [1908] 1 Ch. 743.
(5) 27 L. T. 93.
(6) 6 Ch. D. 447.
(7) 12 Q. B. D. 176.
(8) [1892] 2 Ch. 158.
(9) [1899] 2 Ch. 593.

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recognized by this House in *McEllistrim* v. *Ballymacelligott Co-operative, &c., Society.* (1) So far as *Dibble* v. *Wilts and Somerset Farmers* (2) is inconsistent with the decision of the Court of Appeal in this case, I think that it must be deemed to be overruled.

For the above reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD SHAW OF DUNFERMLINE. My Lords, I think that the order of the Court of Appeal and the reasons therefor stated by the learned Lords Justices are entirely right, and I agree with the judgment just pronounced from the Woolsack.

But in view of the argument submitted to the House, I desire to add the following words as to the true scope and limitation of the present case upon its facts. It was strongly urged upon your Lordships that the underlying ground of the order given must be sought for in, or lead to, the proposition that the appellant society as a member of the respondent society (a co-operative society registered under the Industrial and Provident Societies Act) had surrendered itself as a holder of shares with a definite limited liability so as to stand committed to an indefinite and unlimited liability, and this at the discretion, or it may be at the caprice, of the larger wholesale organization of which it was a shareholder.

My Lords, I think that a case of that kind would require careful and separate consideration. But the facts of this case present quite a different situation.

The appellant society stands bound since March, 1919, and as a holder of 472 shares of the respondent society to the rules of the latter society in force at that date. The important question arises on the construction of r. 6 already read. Head (*b*) thereof is as follows: "Every society or company (not being an allotment society) hereinafter admitted to membership, shall take up at least one share of 1*l.* in the A.W.S. for each member of such society or company and

(1) [1919] A. C. 548. (2) [1923] 1 Ch. 342.

additional shares of an amount taken at the par value thereof equal to 2 per cent. on its turnover as below defined."

The appellants' obligation to take up shares accordingly did not rest upon the caprice or unfettered will of the wholesale society, but upon a contract depending definitely upon the number of members and quoad additional shares upon the striking of a percentage on the turnover of the business.

The contract thus resulting was of the nature of a joint adventure in which the partners' obligations expanded with the expansion of the business.

Accordingly in the notice of October 11, 1923 (containing the resolution of the increase of the respondent society of the allotment of 2211 shares to the appellant society), it was expressly rested upon the "additional turnover and membership during 1918, 1919 and 1920."

The facts as to membership and turnover here founded on are admitted to be correct and to form arithmetically the precise warrant for the allotment made.

In these circumstances no case arises as to the application of a principle of limited liability analogous to that under the Companies Acts. The question is as to a contract to take additional shares on the occurrence of those events which were stipulated as the proper occasion for such an allotment; it has no real reference to the liability of a shareholder in respect of the shares he holds.

To call this a collateral contract does not seem to me to advance matters. It is a contract which, either of itself or as connected with a previous holding, appears to be in no way unreasonable from a business point of view, and it does not appear to be in violation of the principles of either the Industrial and Provident or the Companies Acts.

LORD SUMNER. My Lords, I have had the advantage of considering the opinion just read by my noble and learned friend on the Woolsack, and I agree with him, that the real question is whether the appellants are bound by contract to take up the additional shares, and that the answer depends on the construction of the rules and on the communications

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which passed between the parties with respect to them. The amended rules of 1918 purported to require the appellants to take up further shares. Letters then were written drawing their attention to these requirements, and in reply they asked, on August 20, 1918, how many shares they ought to take up. Being told 470, on the application of the new rule to their then membership and turnover, they sent in reply on October 28 the first instalment of the sum to be paid and afterwards the balance. The form of application, which had been sent for their use, was not signed or returned, but it contained words of agreement "hereby to subscribe and pay" for so many shares and of further agreement "from time to time to subscribe and pay for such further shares as the rule requires." The letters which the appellants actually sent contained nothing to show that the 470 shares were applied for otherwise than on the footing of the amended rule and of this form. I think that the appellants impliedly accepted the amendment of 1918 and agreed to perform it, as circumstances might arise from time to time, and that this obligation became contractually enforceable upon them by action.

This being so the respondents were entitled to judgment. I think, however, for my part, and I submit to your Lordships, that it would be prudent to make a variation in the judgment appealed from in order to make it conform to your Lordships' decision. The Court of Appeal, in addition to ordering payment of the amount due on the shares, the subject of the action, added a declaration substantially in terms suggested by counsel for the respondents. (1) They had argued (2) that the case turned, firstly, on an obligation to take the shares and, secondly, on a contract quite apart from the rule; and they relied mainly on the first point. The declaration is that "under or by virtue of the agreement contained in r. 6 of 1918 . . . . and in the events which have happened, the defendants became liable." The "events which have happened" seem to refer and to refer only to the further increase in the membership and turnover of the

(1) [1925] Ch. 777. (2) [1925] Ch. 772.

appellants' society after the 470 shares were taken up. So, at any rate, I read the judgments delivered in the Court of Appeal. Pollock M.R. says (1): "throughout, the rules being binding upon the defendants, they have contracted with the plaintiff society that the nature of their association with that society is to be such as will be determined by the characteristics which they themselves enjoy." Warrington L.J. says (2): "The obligation is found in the rules, which were in force at all material times" . . . . (and after quoting the amended rule) "there is no dispute that . . . . if that rule is valid and binding, the defendant society became liable to apply for and take up 2211 further shares." Sargant L.J. says (3): "The action was founded upon alternative grounds: first, that an obligation to take the shares arose by virtue of the rules of the plaintiff society, and secondly, that it was a contract to take them, altogether apart from the rules. As regards the second alternative cause of action, I think it unnecessary to say anything, having regard to the fact that I consider the plaintiffs have established their cause of action on the first ground."

Furthermore, I wish to point out that throughout these judgments no mention is made of the letters above referred to or of the significance of the voluntary act of the appellants in applying and paying for 470 shares, as evidence of their actual agreement to take further shares, contingently on the happening of the necessary events in the future.

I agree with the Lord Chancellor that it is not necessary now to decide whether an alteration of this sort in the rules would be binding on a member who had not assented to the alteration, but it is a question so important and, to me at any rate, requiring such strong argument to support an affirmative answer, that I think the declaration made should not be left unamended, lest it should prejudice the consideration of that question, should it ever arise, and I would suggest the insertion of the words "the correspondence between the

(1) [1925] Ch. 782. (2) [1925] Ch. 784, 785.
(3) [1925] Ch. 789.

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parties with reference to" between the words "contained in" and the words "r. 6 of 1918."

I agree that *Dibble's* case (1) was wrongly decided on the point then dealt with—namely, the repugnancy of such an amendment in itself to the whole character and scheme of limited liability. The additional declaration at the end of the judgment of Lawrence J. (2) does not arise for consideration now.

LORD PARMOOR (read by LORD BLANESBURGH). My Lords, this appeal raises the question whether a rule of the respondent society purporting to place an obligation on the appellant society to take up further shares is valid and enforceable. The appellant society and the respondent society are both registered under the Industrial and Provident Societies Act, 1893. The respondent society is a central trading federation for agricultural co-operative societies, and was originally registered in September, 1914, under the name of the Farmers' Central Trading Board, Ld.

In November, 1914, the appellant society applied for, and was admitted to, membership in the respondent society. In the summer of 1918 the respondent society was reorganized. Its name was changed to that of the Agricultural Wholesale Society, Ld., and a new rule was made and registered on October 10, 1918, which provided "that every member, society or company, shall within six months after the end of each financial year of such society or company apply for, and take up such further shares as shall represent any increase in membership, and turnover, over that in which its then present holding of shares shall have been calculated." As a fact the appellant society did make an application in accordance with the above rule, paying a first instalment on 470 shares on October 28, 1918. These shares, together with the two already held by the appellant society, amounted to the number of shares required at the time to satisfy the rule. Sect. 22 of the Act of 1893 enacts that the rules of a registered society shall bind the society and all members

(1) [1923] 1 Ch. 342. (2) [1923] 1 Ch. 353.

thereof, and all persons claiming through them respectively, to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators and assigns, to conform thereto, subject to the provisions of this Act. Unless, therefore, it can be shown that the rule in question is one which the respondent society had no power to make, the appellant society would be bound to comply with its provisions as a contractual obligation undertaken by them. By 1921 the membership and turnover of the appellant society had increased, and it is agreed that, assuming the validity and enforceability of the above rule, 2211 is the correct number of shares which the appellants became liable to subscribe for and take up. A society registered under the Industrial and Provident Societies Act, 1893, is a society in which the liability of members on winding up is qualified by the provision that no contribution shall be required from any industrial society or company, exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member. A similar provision is contained in the Companies Act, 1908, and it has been decided that such provision does not raise any general objection to collateral or extrinsic obligations, not in themselves inconsistent with either common or statute law. I agree with the unanimous opinion expressed in the Court of Appeal on this point, and with the statement contained in the judgment of Warrington L.J. that there is nothing in the Industrial and Provident Societies Act, 1893, which prohibits the undertaking by a member of collateral or extrinsic obligations, within the limitation already stated. In the case of *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* (1) it was held that the special rule, then in debate, was void as being in restraint of trade; but it was not suggested that, but for this objection, the obligation was not one capable of being enforced at the suit of the society.

(1) [1919] A. C. 548.

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In truth the only question for the decision of your Lordships is whether a special rule which in certain events places an obligation on the appellant society to subscribe for and take up additional shares, is inconsistent with the provision of the Act of 1893 which qualifies the liability of members on winding up by the enactment that no contribution shall be required from any individual, society, or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member.

In *Dibble's* case (1), the learned judge, Lawrence J., states that although in that case it was not sought to make a member liable to pay more than the nominal amount of any shares, which he might for the time being hold, yet what was sought to be done was to make him acquire further shares, adding "the effect, however, is the same in both cases and the difference is only one of form." The learned judge, Lawrence J., in the present case followed his previous judgment in *Dibble's* case. (1)

My Lords, the Court of Appeal have found that the difference which the learned judge, Lawrence J., characterized as one of form, is a difference of substance. In this conclusion I agree. No doubt the total liability of a member on the winding up of a registered society under the Act of 1893 is increased by the holding of additional shares on which there is an outstanding amount unpaid, but the qualification that on the winding up of the society no contribution should be required exceeding the amount unpaid on the shares held attaches to the additional shares, neither more nor less, than to the old shares. The contractual obligation undertaken by the appellant society is subject to the qualification introduced by s. 60 of the Act of 1893. I am unable to adopt the view that the liability thus incurred to increase the number of shares is inconsistent with such qualification. There is no section in the Act of 1893 which introduces a limitation affecting the question under appeal beyond that which attaches under the Companies Act of 1908, and if the collateral liability is not inconsistent with the section already

(1) [1923] 1 Ch. 342.

mentioned, it is both valid and enforceable on the analogy of the cases referred to in the judgment of the Court of Appeal.

In my opinion the appeal should be dismissed.

LORD BLANESBURGH. My Lords, I too think that this appeal should be dismissed, and I am in entire agreement with the reasons for that conclusion which have just been given by the Lord Chancellor. I permit myself three further observations:

First, it is, I think, clear that the question raised in *Dibble's* case (1) and underlying, although not necessarily involved in the decision of this case, in no way depends, as has been too freely supposed, upon the fact that the liability of the members of these societies is limited. By reason of the increase or variation in liability inter socios arising from the application of such a rule as is in debate, the question would, I think, be the same even if the liability of the members was unlimited.

Secondly, I am much struck by the fact that a rule of the nature of that here under discussion seems to be in common use in these societies. The appellants themselves have a rule similar in character; and with reference to the Wilts and Somerset Farmers, Ld.—the society which was defendant in *Dibble's* case—as much may be said of its rules both in their original and amended form. I can well believe that regulations of the kind are essential to the successful working of such societies and it would be a serious thing lightly to cast doubt on their validity, especially when it is remembered that no rule or amended rule of any such society has effect unless it is registered, and that it cannot be registered until it has been passed as not contrary to the Act by the Registrar, under s. 10, sub-s. 3, or, if he refuses, by the High Court under s. 7.

My third observation is this. These societies are sui generis. Whether in their limited purpose, or in the incidents attached to their initiation and dissolution or to their shares

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or by reason of the official control exercised at all times over their regulations, they differ most materially from limited companies. Indeed, the Act of 1893 itself contains elaborate provisions for the conversion of societies into companies, s. 54; and for the conversion of companies into societies, s. 55. It would, I conceive, in these cases be highly dangerous to assume that a decision given with reference to these societies and induced it may well be by their special characteristics applies to companies regulated by the Companies Acts.

Mr. Clauson wanted your Lordships to say that a disapproval of the decision in *Dibble's* case (1) would open the door to regulations being introduced both originally and by amendment into the articles of association of limited companies whereby, as a result, the protection afforded to shareholders by s. 192 of the Companies (Consolidation) Act, 1908, would be lost, the decisions in such cases as *Manners* v. *St. David's Gold and Copper Mine* (2) and *Bisgood* v. *Henderson's Transvaal Estates* (3) rendered valueless, and the ends compassed by that reconstruction section attained without provision of any of its safeguards. My Lords, I have no fears on that score. I cannot see that anything now decided by your Lordships is even remotely connected with these matters, or any of them.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 29, 1926.

Solicitors for the appellants: *Doyle, Devonshire & Co., for J. Morris Shaw, Leek.*

Solicitors for the respondents: *Linklaters & Paines.*

(1) [1923] 1 Ch. 342. (2) [1904] 2 Ch. 593.
(3) [1908] 1 Ch. 742.

[HOUSE OF LORDS.]

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED . . . } APPELLANTS;

AND

SEDGWICK, COLLINS AND COMPANY, LIMITED . . . . . } RESPONDENTS.

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Foreign Corporation—Garnishee Order—Judgment against foreign Company carrying on Business in this Country—Default of Appearance—Repudiation of Authority to accept Service of Process by English accredited Representative—Validity of Service—Nationalization of industrial Companies by Soviet Government—Liquidation of foreign Company in England—Admission of Validity of Judgment by English Liquidator—Duty of foreign Court to recognize Judgment—Comity of Nations—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 274, *sub-s.* 1 (*c*).

A Russian insurance company, having its principal office in Petrograd and a branch office in London, in accordance with s. 274 of the Companies (Consolidation) Act, 1908, filed with the registrar the name of C. as its authorized representative to accept service of process on its behalf. By a series of decrees passed in 1918 the Soviet Government purported to put all insurance companies in Russia into liquidation and to appropriate their property. In the spring of 1923 C. sent a notice to the registrar that the company which he represented had ceased to exist, and at his request this notice was placed upon the file. In the summer of the same year the respondents brought an action against the company by specially indorsed writ for payment of a sum of money claimed to be due to them in respect of certain insurance transactions. The writ was served upon C., who protested that he had no power to act for the company, and judgment was signed in default of appearance. In 1924 the respondents obtained in this action a garnishee order nisi attaching all debts due from the appellants to the judgment debtors. The appellants took out a summons against the respondents to have the judgment set aside, and the respondents applied to have the garnishee order nisi made absolute or an issue directed. Fraser J., affirming the decision of the Master, dismissed both applications. Shortly after this decision an order was made for the winding up of the company in this country. The Court of Appeal, after ascertaining from the liquidator that he did not propose to question the judgment, refused to set aside the judgment, but as regards the garnishee proceedings directed an issue:—

Held, upon the respondents' application, (1.) following *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A. C. 112, that at the date of the writ the company had not

* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD BLANESBURGH.

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ceased to exist by virtue of the decrees of the Soviet Government; (2.) (by Viscount Cave L.C., Lord Shaw of Dunfermline, Lord Sumner, and Lord Parmoor; Lord Blanesburgh dissenting) that the service of the writ on C. was valid; (3.) (by the same majority) that the company by putting on the file the name of a person authorized to accept service of process on its behalf agreed to submit to the jurisdiction of the Court, and that therefore it must be assumed that the Russian Government would, according to the comity of nations, recognize the judgment as effective: (4.) (by all their Lordships) that the liquidator in the English winding up had in effect admitted the validity of the judgment and of the garnishee proceedings, and that no foreign Court had the right to go behind that admission.

Held, therefore, that an issue should be directed.

Held, upon the appellants' application, that the appellants had no sufficient interest in the judgment, and that there was no ground for setting it aside.

Jacques v. *Harrison* (1884) 12 Q. B. D. 165 followed.

Order of the Court of Appeal affirmed.

APPEAL from two orders of the Court of Appeal (Bankes, Scrutton and Sargant L.JJ.).

By the first order the Court affirmed a decision of Fraser J. in chambers refusing to set aside a judgment obtained by the respondents against the Rossia Insurance Co. of Petrograd.

By the second order the Court (Scrutton L.J. dissenting) reversed a decision of Fraser J. discharging a garnishee order nisi attaching the debts due from the appellants to the judgment debtors and directed an issue.

The following statement is taken from the opinion of the Lord Chancellor :—

A company incorporated by Russian charter and called the Rossia Insurance Co. had its principal office in Petrograd and a branch office in London. Under s. 274 of the Companies Consolidation Act, 1908, the Rossia Co. filed with the registrar the name of Mr. Collins as that of a person who was authorized to accept on behalf of the company service of process and of any notices required to be served on the company. The company carried on insurance transactions with the respondents, and became indebted to them. The company also transacted reinsurance business with the appellants and is alleged to have become entitled to a large payment from them.

After the second Russian revolution (the Bolshevik revolution) the Legislature of Soviet Russia passed a series of decrees by which it purported (to put it shortly) to put all insurance companies in Russia into liquidation, to appropriate their property to the Soviet Government without compensation and without any obligation to pay their debts, and to annul their shares. On March 22, 1923, the solicitor for Mr. Collins wrote a letter to the registrar of joint stock companies in the following terms: "I have further considered the cases which have been decided, and it seems that, the British Government having recognized the Soviet Government in Russia, the above company has been nationalized with all similar institutions, and has therefore ceased to exist as a separate entity. Following your suggestion, I shall be glad if you will place this letter on the company's file." The letter was accordingly placed on the file.

On May 31, 1923, the respondents commenced an action in the High Court against the Rossia Co., describing them on the writ as "the Rossia Insurance Co. of Petrograd" and claiming payment in respect of the insurance transactions of 4505*l.* 12*s.* 6*d.* and interest; and the writ was served on Mr. Collins. Mr. Collins did not enter an appearance on behalf of the Rossia Co., and on June 12, 1923, the respondents signed judgment against the company for 4513*l.* 0*s.* 3*d.* and costs. On December 20, 1924, the respondents obtained in this action a garnishee order nisi attaching all debts owing or accruing due from the appellants to the Rossia Co. to answer the judgment obtained against that company by the respondents; but Master Ball, after hearing the evidence, refused to make the garnishee order absolute, on the ground that he had a discretion in the matter and that he was not satisfied that, if the order were made absolute and the amount of the judgment debt paid by the appellants to the respondents, the Soviet Government might not decline to recognize the judgment and compel the appellants to pay the amount over again. The decision of the Master was affirmed by Fraser J., but on appeal to the Court of Appeal that Court set aside the order of Fraser J., and, the appellants denying

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that they owed anything to the Rossia Co., directed an issue to be tried on that point. At the same time the Court of Appeal affirmed an order of Fraser J. refusing to set aside the judgment. It is against these orders of the Court of Appeal that the present appeal is brought.

1926. June 10, 11, 14, 15. *Sir John Simon K.C.* and *Jowitt K.C.* (with them *Thomas Carthew*) for the appellants. The making of a garnishee order is discretionary, and an order which will subject the garnishee to the risk of having to pay his debt a second time is inequitable and will be refused : *Martin* v. *Nadel* (1); *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd.* (2) Fraser J. was right in thinking that it would not be safe or proper in the circumstances to hand this money over. As the result of a series of decrees of the Soviet Government the Rossia Co. had ceased to exist when judgment was obtained against it by default. Those decrees passed through three stages. First, the activities of the Russian joint stock insurance companies were placed under Government supervision and control, that was followed by a state appropriation of dividends, and finally, insurance business was declared to be the monopoly of the state and all private companies were to be liquidated and nationalized by a certain date. In accordance with those decrees the Rossia Co. was placed in liquidation by the Soviet Government as from December 8, 1918. A judgment obtained against a company which has ceased to exist cannot be the foundation of garnishee proceedings. Further, the procedure by which this judgment was obtained was irregular. In accordance with the requirements of s. 274 of the Companies (Consolidation) Act, 1908, the Rossia Co. filed with the registrar the name of a Mr. Collins as a person authorized to accept service of process on behalf of the company, but before the issue of the writ Collins took all possible steps to secure the removal of his name from the register, on the assumption that the company was not in a position to make the application, as being either dead or moribund, and the only reason why his

(1) [1906] 2 K. B. 26. (2) (1924) 20 Ll. L. Rep. 308, 309.

name remained on the register was that the Act contained no provision for its removal.

Assuming that the service was lawfully effected by English law, it does not follow that the foreign Government will recognize a judgment obtained in this country against a company which has long ceased to carry on business here upon service on an individual who has protested against being left on the register. An action may be brought upon a foreign judgment when the defendant has appeared, unless the judgment has been obtained by fraud ; but when judgment is obtained in default of appearance it must be proved that, though the defendant did not appear, he was nevertheless affected with notice and had the duty of appearing. A foreign company served in the manner provided by the Companies Act must be treated as effectually served for the purposes of our law, but it does not follow that by the comity of nations it will be treated as bound. The Russian Courts are not concerned with the code of procedure as to service adopted in this country, and will not recognize a judgment of the English Court unless it is binding on the conscience of the defendant: *Douglas* v. *Forrest* (1); *Schibsby* v. *Westenholz* (2); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote.* (3) The compliance by the foreign company with the requirements of s. 274 is no evidence of an agreement to submit to the jurisdiction. The winding up of the Rossia Co. in this country leaves the matter where it was. As to setting aside the judgment, that raises the question whether the service was valid under the statute, but the summons has been dismissed on a technical point. It is said that, if C. applies to upset a judgment obtained by A. against B., C. must serve both A. and B.: *Jacques* v. *Harrison.* (4) But the Lords Justices were not there dealing with the case where it was in dispute whether one of the parties did in fact exist. The judgment obtained against the Rossia Co. assumed the existence of the company and, as the judgment would embarrass the appellants on the question whether there was such a company

(1) (1828) 4 Bing. 686.
(2) (1870) L. R. 6 Q. B. 155.
(3) [1894] A. C. 670, 684.
(4) 12 Q. B. D. 165.

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capable of being served, this summons was necessary. It is farcical to insist upon the applicant serving a party who he maintains does not exist.

Rayner Goddard K.C. and *S. O. Henn Collins* for the respondents. The question of the existence of the company at the date of the judgment is concluded by the decision of this House in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (1) The respondents having served the company through its accredited representative in this country in accordance with the provisions of the statute, they are entitled as judgment creditors to garnishee all debts due to the judgment debtors. There is no evidence that this company has ceased to do business in this country, but, supposing it has, so long as the company allows Collins's name to remain on the file so long is it bound. Collins at all material times was held out by the company as the person authorized to accept service on its behalf, and during that time service on him was effectual against the company. The English creditor is not concerned with the domestic relations between the company and its representative: cf. *Wright* v. *King.* (2) As to the objection founded on the risk to the appellants if the garnishee order is granted, the Courts of this country ought to assume that the Courts of Russia, a power recognized de jure by His Majesty's Government, would recognize the discharge in accordance with English law of debts due in Great Britain. The doctrine had its origin in *Martin* v. *Nadel* (3), but there the debt was not payable in this country at all, and the ground of the decision was that, as the debt was not locally situate in this country, payment in this country would not effect a discharge in Berlin. *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (4) is also distinguishable, because there was there no effective service. The Rossia Co., by establishing itself in this country and appointing an authorized representative to accept service, must be taken to have agreed to submit to the jurisdiction: *Bank of*

(1) [1925] A. C. 112.
(2) (1846) 9 Beav. 161.
(3) [1906] 2 K. B. 26.
(4) 20 Ll. L. Rep. 308.

Australasia v. *Harding*. (1) The English business of the Rossia Co. being in liquidation in this country, and the liquidator having declined to attack the judgment, there can be no objection to enforcing the judgment by attaching the debts due to the judgment debtors. As to setting aside the judgment, the garnishee has no interest in the matter; it matters not to him whether he pays A. or B.

Sir John Simon K.C. in reply. Assuming that there ever was an agreement by the company to be bound by a judgment obtained by service on Collins, that agreement is not binding after the company has ceased to be a trading corporation at all. The representative character of the company's agent is destroyed by the company going into liquidation: *Stirling* v. *Maitland*. (2) The whole of the machinery of s. 274 is limited to such time as the Rossia Co. is carrying on business. The Act contains provisions for the removal of dead and moribund companies in England, but there are no similar provisions as to foreign companies: see ss. 195 and 242.

[He also referred to *Vallée* v. *Dumergue*. (3)]

The House took time for consideration.

1926. July 29. VISCOUNT CAVE L.C. My Lords, this case arises out of the confiscatory legislation of the Government of Soviet Russia. [His Lordship stated the facts.] The first point made on behalf of the appellants is that, when the respondents issued their writ and obtained judgment against the Rossia Co., that company had by virtue of the decrees of the Soviet Government ceased to exist, and accordingly that no judgment could be obtained against that company upon which to found garnishee proceedings. In my opinion this point is disposed of by the decision of this House in the case relating to the Russian banks (*Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (4)), in which it was held that the parallel decrees of the Russian Legislature affecting the banking companies

(1) (1850) 9 C. B. 661.
(2) (1864) 5 B. & S. 840.
(3) (1849) 4 Ex. 290.
(4) [1925] A. C. 112.

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in Russia had not the effect of dissolving those companies but only put them into liquidation. The difference between an order for the liquidation of a company and an order for its dissolution is familiar to all lawyers, and is fully recognized in the affidavit made in this action by M. Krougliakoff (a Russian lawyer) on behalf of the appellants. A company which has been dissolved no longer exists as a corporate entity capable of holding property or of being sued in any Court; but a company in liquidation, although the administration of its affairs has passed to the liquidator, retains its corporate existence. If the liquidation should be annulled, the company will resume its powers; and in the meantime it retains its title to any property not taken away from it—including (in the present case) the property and rights of the company in countries foreign to Russia, which are not effectively taken from it by the Russian legislation. In my opinion the decrees for nationalizing insurance companies in Russia which have been put in evidence in this action are at least not stronger than the decrees for nationalizing the banking companies which were considered in the case of the banks; and accordingly the insurance companies, like the banking companies, have not been dissolved.

But it is said that, assuming this to be so, the judgment is still defective as having been obtained under a writ served upon Mr. Collins after the Rossia Co. had ceased to carry on business in this country and after his notice of March 22, 1923, had been sent to the registrar and entered on the file, and accordingly that a garnishee order obtained under that judgment is open to attack. My Lords, I do not doubt that, if it were proved that the writ was not duly served and accordingly that the judgment was liable to be set aside at any time, the Court might well, in the exercise of its discretion, refuse to treat the judgment as a sufficient foundation for a garnishee order; for it would be inequitable to put the garnishee to a real and substantial risk of having the proceedings set aside and being called upon to pay the judgment debt over again: see *Martin* v. *Nadel.* (1) But it appears

(1) [1906] 2 K. B. 26.

to me that there are two answers to the argument put forward on behalf of the appellants.

In the first place Mr. Collins' name remained upon the file as representing the Rossia Co. at the time when the writ was served upon him. Whether any proceeding was open to him by which he could without the concurrence of the Rossia Co. have removed his name from the file, it is unnecessary now to consider; for neither he nor the Rossia Co. took any proceeding for that purpose, and he contented himself with serving a notice which, though no doubt given in good faith, was incorrect—namely, that the company had ceased to exist. Further, there is evidence that, long after the Rossia Co. had ceased to carry on business in this country and had been put into liquidation, Mr. Collins was conducting a correspondence on behalf of that company. In these circumstances I do not think that the notice given by Mr. Collins was sufficient to relieve him from his position as the representative of the Rossia Co. for the purposes of the Act or to nullify the nomination of that gentleman as the person to receive service of process on behalf of the Rossia Co.

But there is a further answer to the appellants' argument. An order to wind up the Rossia Co. has now been made under the Companies Act, and the liquidator on inquiry being made of him by the direction of the Court of Appeal informed that Court that he had fully investigated the matter and did not propose to contest the validity of the judgment obtained by the respondents against the Rossia Co. In view of this statement it appears to me that the validity of the judgment in this country is established beyond controversy. It is said that this is not enough to free the appellants from risk; that it is conceivable that at some future time they may desire to set up business in Russia and may acquire property there; that in that event the Russian Government, refusing to recognize the judgment and garnishee order as valid, may require the amount paid under the garnishee order to be paid over again; or at least that, if the appellants should seek to recover from the Russian Government any moneys

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owing to them from other insurance companies which have been nationalized, the Russian Government may seek to set off against those claims the amount of the judgment debt. My Lords, I do not think that this supposed risk, which rests upon a series of hypotheses, is a real and substantial danger. It must be assumed that the Russian Government will be prepared to act in accordance with the rules of international law; and it appears to me that those rules would require the Russian Courts to recognize the judgment as effective. No doubt it is the general rule that a judgment obtained against a foreign defendant not resident or present in this country in an action in which he has not appeared need not be recognized by the Courts of his own country; but this rule does not apply where the defendant has expressly or impliedly agreed to submit to the jurisdiction of the Court by which the judgment was pronounced. A good instance of such submission is to be found in the case of *Vallée* v. *Dumergue* (1), in which it was held that a defendant who was a shareholder in a French company and had under compulsion of French law elected a domicil in France at which proceedings relative to the company might be served upon him, was bound by service at that address and by a judgment obtained in his absence after such service. In like manner it appears to me that the Rossia Co., having in accordance with the Companies Act put upon the file the name of a person authorized to accept on its behalf service of any process, thereby submitted to the jurisdiction of the English Courts and is bound by the judgment obtained in those Courts.

There is this further consideration. The order made in this country for the winding up of the Rossia Co. is undoubtedly effective so far as the English assets are concerned; and this being so, the liquidator, who might have given a receipt or discharge for the appellants' debts, was at liberty to admit the validity of the judgment and of the garnishee proceedings. In effect he has done so, and no foreign Court has the right to go behind that admission.

(1) 4 Ex. 290.

For these reasons I think that the appeal against the order of the Court of Appeal directing an issue in the garnishee proceedings fails. As regards the appeal against the refusal to set aside the judgment, this appears to me to fail also. Apart from the objection that the Rossia Co. had not been served with this application, the appellants have no such direct interest as to entitle them to apply to set aside the judgment. The liquidator does not attack it, and no reason is shown why it should be set aside. Of course it will be open to the appellants in the garnishee proceedings to argue that nothing is due from them to the Rossia Co. which can be attached; but if this argument should fail the not undesirable result of the proceedings will be that a sum due in England from an English company to a Russian corporation will be appropriated to the payment of a debt owing in England by that corporation to another English company.

On these grounds I am of opinion that the Court of Appeal came to the right conclusion in this case, and accordingly I move your Lordships that this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

LORD SUMNER. My Lords, two orders made in chambers form the subject of this appeal. The first dismissed the present appellants' summons to set aside a judgment recovered by the present respondents against a third party, the Rossia Insurance Co. This being a judgment to which the applicants were not parties, it has been held on the authority of *Jacques* v. *Harrison* (1) that they were not competent to ask that it should be set aside. *Jacques* v. *Harrison* (1) is a decision of the Court of Appeal on a point of practice, and it has been followed without question for over forty years. It would require strong grounds indeed to induce your Lordships to disapprove it now. For my part I think that it is correct, and, accordingly, that the summons to set aside this judgment was rightly dismissed.

(1) 12 Q. B. D. 165.

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The second order was one refusing to make absolute a garnishee order, obtained by the present respondents as judgment creditors against the appellants, who are indebted to the Rossia Insurance Co. The Court of Appeal made the order absolute. The present appeal is mainly supported on grounds relating to the discretion which is exercisable in garnishee proceedings, but in one respect at least reliance is rightly placed on matters which would have also gone to the merits of the application to set the judgment aside. The appellants say that the Rossia Insurance Co. has been dissolved and that, accordingly, they owe it no debt. Whether or not the money formerly due to it is now due to the Crown as bona vacantia, the Crown is not a claimant or a party to these proceedings. Upon the question of discretion it is said that the judgment was obtained in such a manner that foreign Courts would not, and would not be bound to, respect it, and that accordingly it was a wrong exercise of discretion to make the garnishee order absolute and so expose the appellants to the risk of being compelled by a foreign tribunal to pay over again.

The main question is whether the judgment is one to which, according to the current of English decisions, foreign Courts of justice may be expected to give effect. The expectation is not one of fact depending on the probable conduct of the Courts of this or that country, but is one of law, based upon the consideration for the judicial proceedings of other countries, which legal administration, wherever situated, ought to adopt and observe in the interest of justice generally.

The respondents are judgment creditors of the Rossia Insurance Co. in virtue of proceedings in the High Court commenced by service of the writ on the person, whose name was placed and is still to be found on the companies' register pursuant to s. 274 of the Companies Consolidation Act, 1908. No appearance having been entered after this service judgment was in due course signed. It is regular under the practice of the High Court, but to a foreign Court it would in itself be a judgment in absentem against a defendant

company not incorporated in His Majesty's dominions. The question whether the company was resident in the United Kingdom down to and at the time of service has not been raised. The question argued was this: Was the registration of Mr. Collins's name, continuing as it is to the present time, a submission to the jurisdiction of the High Court on the part of the Rossia Insurance Co. at the time of the service of the writ?

Prior to December 13, 1917, the Rossia Insurance Co. had done reinsurance business in London under treaties with the appellants, and it may be with other underwriters, and more recently it had undertaken the business of underwriting original insurance risks on its own account. For both classes of business it employed Mr. Collins as its agent, under the title first of secretary and then of manager, and it had an office in the City, where the business thus established was carried on in its name. To satisfy the requirements of s. 274 Mr. Collins registered his name on December 13, 1917.

My Lords, I think that in itself this constituted a complete submission to the jurisdiction of the High Court, revocable only by the company's own act. With the doubts that have been raised as to the authority of Mr. Collins and to the continuance of this submission on other grounds I will deal presently. The section is legislation of a character which has long been recognized as valid in English law (*Bank of Australasia* v. *Harding* (1)), and it deals with the case of a company incorporated outside the United Kingdom as the Rossia Insurance Co. was, but establishing a place of business inside the United Kingdom, as it had recently done. It imposes on such a company sundry "requirements," as follows: "shall file with the registrar of companies the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any other notices required to be served on the company; and, in the event of any alteration being made . . . . in the names or addresses of any such persons as aforesaid, the company shall within the

(1) 9 C. B. 661.

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prescribed time file with the registrar a notice of the alteration" (s. 274, sub-s. 1 (*c*)).

Compliance with these requirements is secured by fines, which in case of the continuance of the offence are heavy, and may be inflicted not only on the company but on its officers. One plain object of the provision is to protect the company's British creditors by obtaining for them ab initio the means of serving process in this country, free from the inconvenience of seeking out the foreign company in its country of incorporation. I think further that, having submitted to the jurisdiction before and at the commencement of the proceedings, the company must be deemed in the absence of any provision to the contrary to continue to submit to the jurisdiction throughout, and that this judgment, signed after due service in default of appearance, is one which is binding on the foreign company and ought to be so regarded in all foreign civil jurisdictions.

The appellants challenge this conclusion on three special grounds; first, that, before Mr. Collins registered his name, the Rossia Insurance Co. had been effectively dissolved; second, that, before he registered his name, his entire authority to do anything on behalf of the Rossia Insurance Co. had determined; and, thirdly, that before the respondents' writ was served on him, he had revoked his own consent to act on behalf of the Rossia Insurance Co., and, having done what he could to nullify the appearance of his name on the register, was no longer a person "authorised" to accept service on behalf of the company within the section. Accordingly it is said, the service of the writ on him by the respondents did not affect the company or found proceedings that could result in an effective judgment against it.

Your Lordships decided last year that the decrees of the Soviet Government of Russia, which then were textually before you, did not in the case of banking companies dissolve the companies themselves, but only stripped them of their assets and destroyed their goodwill by making banking a state monopoly, while at the same time they deprived the shareholders of their shares. In these decrees not only the

word " dissolution," but the thing itself was carefully avoided, no doubt for solid practical reasons. The corresponding decrees relating to insurance companies are now before your Lordships, and they prove to differ from the others in words only. The substance and effect are the same, and the Rossia Insurance Co. accordingly is still in being.

M. Krougliakoff, the only Russian lawyer who made an affidavit, says that the power of attorney given to Mr. Collins in 1912 expired, according to pre-revolutionary law, in 1915. He does not say that authority could not be legally conferred upon or continued to Mr. Collins otherwise than by the renewal of the power of attorney. Mr. Collins himself was clearly unaware down to 1923 that his authority to act for the Rossia Insurance Co. had come to an end. For three or four years he acted as agent for the company and was in regular communication with it, and he continued to do such business as there was to be done and maintained some relations with the superior officials of the company as opportunity offered after the revolutions of 1917. I do not think it is proved that by Russian law, whether pre-revolutionary or post-revolutionary, he had no authority all this time to do on the company's behalf all that he ostensibly did for it, nor do I see any reason why the question of his authority to carry on in London the business established here by the company should not be determined by English law. I think that down to the service of the writ he was in fact, as he purported on the companies' register to be, the Russian company's agent, authorized among other things to accept on its behalf service of process issued at the suit of English creditors.

Early in 1923 Mr. Collins was served with a writ on behalf of a creditor of the Rossia Insurance Co. other than the respondents, and then consulted his solicitor upon the question whether he had still any right in fact to represent the Rossia Insurance Co. The ground of doubt, as appears from a letter written by his solicitor to the registrar of companies on March 5, 1923, was the above mentioned Russian decrees, which were then supposed to have dissolved the Rossia Insurance Co. The practical question was whether Mr. Collins

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could or could not enter an appearance for that company, or whether steps should be taken to remove his name from the register, where it still stood as their representative. Eventually, for what it might be worth, another letter, written by his solicitor on March 22, was placed on the companies' file, stating that the Rossia Insurance Co. had ceased to exist as a separate entity. This it is now clear was an error. No other reason was ever given for Mr. Collins's desire to have his name removed. It is evident that, if the Rossia Insurance Co. still existed, he had no objection to continue to represent it as before. In any case there his name was and the Rossia Insurance Co. had made no alteration in the register such as s. 274, sub-s. 1, provides for. Such was the condition of affairs as regards Mr. Collins, when the respondents' writ was served. I think the service was valid and that Mr. Collins had authority to enter an appearance, which, if he had been otherwise advised, he could and would have validly exercised.

Furthermore I notice that Mr. Collins has not proved when the business of the Rossia Insurance Co. in London actually ended. Its reinsurance treaties were kept on foot till the end of 1920, and in 1921 Mr. Collins wrote as its manager from its address in London to the registrar of companies, saying that when its general manager came to London in February, as he was expected to do, steps would be taken to furnish the balance sheet required. His solicitor repeated this assurance in April, adding that it was now possible to renew business negotiations with Russia. Even when the respondents' writ was served on Mr. Collins and was returned by his solicitor, the ground taken was only the dissolution of the Rossia Insurance Co. by the Soviet Government's decrees, not the de facto winding up of its English branch and all its operations. All the solicitor could say as to this was, "I must think the problem out." As the evidence stands the English branch of the company's business was still living and established in London, though no doubt it chiefly lived in hope.

Master Ball stated in writing his reasons for refusing to

make absolute the garnishee order nisi. Fraser J. affirmed his order without any formal judgment. I agree with the Court of Appeal that the learned judge must be deemed to have adopted the learned Master's reasons, and, as those reasons were reasons of law and were erroneous, because he had misapprehended the effect of the decision in *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd* (1), and thought wrongly that it was on all fours with the present case, the Court of Appeal were right in holding that no question arose of interfering with the discretion of the judge at chambers.

Thereupon the Court made the order now appealed from, and it is contended that in so doing they exercised their discretion wrongly, for, in the circumstances, such an order was inequitable, since it exposed the appellants to the risk of being compelled to pay a second time whatever they might pay to the judgment creditors here under the order of the Court of Appeal.

This question of risk is presented in two different ways. The affidavits for the appellants virtually say, "if we go to Russia, what will happen to us there, when this garnishee order has been made absolute?" Scrutton L.J., in a dissentient judgment, virtually says, "no such order should be made, for we cannot be sure that the Courts of Russia, or indeed foreign Courts generally, will take the same view as we do of the binding effect of this judgment, which has been signed here in default of appearance."

To these objections I think that two answers may be made. The first is that, so far as Russia is concerned, the risk would be self-sought; the second is that, for any practical purpose, it cannot be estimated and may well be non-existent. The business of the appellant company is confined, as far as I have gathered, to insurance. For the present, insurance business is in Russia a Government monopoly. The appellants cannot re-establish themselves in that business in Russia, so as to be exposed to proceedings there in respect of this debt, until the Russian Government has abandoned or at least has altered its law relating to the insurance monopoly.

(1) 20 Ll. L. Rep. 308.

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When it does so, other changes may occur at the same time, which may remove all the risk which the appellants apprehend. It may be that debts are due to the appellants in Russia, which they would fain collect there, and that the risk of having the debt, due from them to the Rossia Insurance Co., enforced by the Russian Courts is a risk, which in that case they would have to run. I notice, however, that M. Krougliakoff, though he argues learnedly and with skill the case for dissolution of the company and determination of all its agencies, does not say that the rules of law, which he invokes, are rules which are or would be enforced or recognized in courts of civil jurisdiction in Russia at the present time, or even that there are any such courts at all. As for the view, that foreign Courts generally cannot be expected to recognize judgments obtained here under specific legislation and particular circumstances, that raise an arguable doubt as to their validity, I do not think that this is a ground for a discretionary refusal to make the garnishee order absolute, when once it has been decided here that such judgments have been regularly obtained after an effective submission to the jurisdiction on the part of the defendants. In that case foreign Courts ought to recognize the judgments, and we must presume that they will do so. It is not justice to the garnishor to deny him his regular remedy for fear that, somehow or other, the garnishee, having passed beyond the jurisdiction of the Courts of this country and the protection which the garnishee order will always here afford him, might find himself caught in some foreign Court or country less willing than should be the case to recognize those obligations which arise under the so-called comity of nations. The risk to the garnishee, which it is inequitable to expose him to under a garnishee order absolute, must be a real risk: *Sea Insurance Co.* v. *Rossia Insurance Co. of Petrograd.* (1) A mere speculative or theoretical hazard will not do.

My Lords, I will only add that the issue which the Court of Appeal directed to be tried in my opinion sufficiently

(1) 20 Ll. L. Rep. 308, 309.

protects the appellants, and that their appeal should be dismissed.

LORD PARMOOR (read by LORD SHAW OF DUNFERMLINE). My Lords, a Russian company, known as the Rossia Insurance Co., started an insurance business in Russia in the year 1881, and carried it on, under a series of Russian charters, of which the most recent is dated 1915. In the year 1912, the Rossia Co. opened a branch in England, and, consequently, came under the obligation, imposed by s. 274 of the Companies Act, 1908, to file with the registrar of companies the names and addresses of some one or more persons resident in the United Kingdom authorized to accept on behalf of the company service of process, and any notices required to be served on the company.

On December 17, 1917, the name of A. J. Collins was registered under s. 274 of the Companies Act, 1908, as a person authorized to accept, on behalf of the Rossia Co., service of process, and any notices required to be served on that company. A specially indorsed writ was regularly served on Collins, and the respondents, in default of appearance, obtained judgment for 4513*l.* 0*s.* 3*d.*

In the course of their business in this country, the Rossia Co. had entered into a number of reinsurance treaties with the appellants. Any sums due from the appellants, under these treaties, were payable in England. On December 20, 1924, the respondents obtained a garnishee order nisi attaching debts due from the appellants, in respect of business transactions under the reinsurance treaties. The respondents, as judgment creditors, applied to make the garnishee order absolute, and the appellants, as garnishees, applied to set aside the judgment. Their applications came on for hearing before Master Ball in chambers on February 25, 1925. He refused to set aside the judgment. This decision was confirmed by the judge in chambers, and the Court of Appeal. The accuracy of this decision was not seriously disputed before their Lordships. There is no ground for interfering, under this head, with the decision of the Courts below.

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The application on behalf of the judgment creditors, to have the garnishee order nisi made absolute, was dismissed by the Master, and his order was confirmed by the learned judge in chambers. The making of a garnishee order is discretionary (*Martin* v. *Nadel* (1)), and in an ordinary case the Court of Appeal does not interfere with this discretionary power; but, as stated in the judgment of Bankes L.J., there appears to be an all-important distinction between the present case and that of *Sea Insurance Co.* v. *Rossia Insurance Co.* (2), which the Master thought he ought to follow, as applicable to the present case. In the former case the service was effected out of the jurisdiction, whereas in the present case it was effected within the jurisdiction under the provisions of s. 274 of the Companies Act, 1908. To use the words of Bankes L.J., this is a difference of overriding importance.

My Lords, in the case of actions in personam, in which a writ has been regularly served on foreigners or foreign corporations, when present in this country, and a judgment has been obtained, it seems to be clear, as a general rule, that, under the obligations of that branch of international law, which governs the application of foreign judgments, other countries, whose Governments have been recognized de jure and de facto by the Government of this country, will accept the jurisdiction of the Courts of this country, and regard their judgments as valid. In the case of such actions, it may also be stated negatively that, where a writ cannot be served on a defendant foreigner, or foreign corporation, when in this country, and no submission to jurisdiction is proved, any consequent judgment has no validity in any other country, on the ground that the Courts of this country have no jurisdiction under international law over the person of an absent foreign defendant. In other words, the right to serve a writ, in an action in personam, on a foreign defendant, only becomes effective, as a source of jurisdiction, to be recognized in other countries when, at the date of service, such defendant is within the territorial jurisdiction

(1) [1906] 2 K. B. 26. (2) 20 Ll. L. Rep. 308, 309.

of the English Courts. The Privy Council decided in the case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1) that no territorial legislation can give jurisdiction in a personal action which any foreign Court should recognize against absent foreigners owing no allegiance or obedience to the Power which so legislates. Lord Selborne in delivering judgment says: "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced": cf. *Emanuel* v. *Symon* (2); *Rousillon* v. *Rousillon*. (3) The Rossia Co. was, for the purpose of the service of a writ, within the jurisdiction of the English Courts, when the writ in question was served, seeing that it was regularly served on Collins, a person registered under s. 274 of the Companies Act, 1908, as a person authorized to accept on behalf of the Rossia Co. service of process, and any notices required to be served on that company. The main object of s. 274 is to take away any difficulty in the service of a writ on foreign corporations carrying on business in this country, and in effect to place a foreign corporation for this purpose on the same footing as an English company, and liable to the service of a writ under a similar form of procedure. There is an additional reason which brought the Rossia Co. within the territorial jurisdiction of the English Courts at the time when the writ was served. The Rossia Co., by filing with the registrar of companies the name and address of Collins, submitted voluntarily to the jurisdiction of the English Courts and, on this account, cannot subsequently be heard to object to such jurisdiction.

The appellants raised two points as either displacing the

(1) [1894] A. C. 670, 684. (2) [1908] 1 K. B. 302.
(3) (1880) 14 Ch. D. 351.

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principles stated above, or at least throwing a doubt on the regularity of the service in this case. It was said that although Collins was registered under s. 274 of the Companies Act, 1908, his name was only retained on the register against his will, and in default of any effective method of removal. Collins did attempt, without success, to disclaim his position as representing the Rossia Co. in this country, but so long as his name remained on the register, a service on him was equivalent to a service on the Rossia Co., and the Rossia Co. remained liable to the territorial jurisdiction of the English Court.

It was suggested that there might be some risk that a foreign Court would not feel itself bound by the English decision, and that it was inequitable that the appellants should run the risk of being liable to a double payment. It cannot be assumed that the Russian, or any other recognized Government, will not accept the validity of the service of the writ served on Collins, or that it will not, as a matter of international comity and in accordance with international principle, observe the obligation, that, where a national has taken advantage of the municipal law in order to secure a business footing in this country, the Government of the state, of which such national is a member, will recognize the conditions upon which alone the national obtains that advantage.

An order has been made by Romer J. to wind up the Rossia Co. The service in this case was on Collins, and the Court of Appeal postponed judgment until after the official receiver had had an opportunity to determine what he would do. The Court of Appeal were informed that the official receiver and the solicitor went carefully into the effect of the judgment, and came to the conclusion that they could not attack it. There appears, therefore, to be no reason to doubt that the judgment was properly obtained. In English law it cannot be disputed that a creditor, who has obtained a garnishee order in respect of a debt owing from a company prior to the date of its liquidation, has a security in priority to the general creditors. The effect, therefore, of dismissing the appeal of the garnishees would not prevent the respondents

claiming in the liquidation proceedings, but would only operate to deprive them of the opportunity of becoming secured creditors. Since the Government of this country has recognized the present Government of Russia, both de facto and de jure, there appears to be no difference in principle between the present case and the case of *Swiss Bank Corporation* v. *Boehmische Industrial Bank.* (1) In my opinion the appeal should be dismissed with costs.

LORD BLANESBURGH. My Lords, the enactment contained in s. 274 of the Companies (Consolidation) Act, 1908 —extended, if not already applicable, to foreign assurance companies by s. 19 of the Assurance Companies Act, 1909— is of comparatively recent origin. It appeared first as s. 35 of the Companies Act, 1907. For many generations before that, of course, foreign companies in great number had been established in this country. And such companies were liable to be sued here like any other resident, whether the cause of action did or did not accrue within the jurisdiction: *Logan* v. *Bank of Scotland* (2); *Haggin* v. *Comptoir d'Escompte de Paris.* (3) Service of the writ on the principal officer of the English branch was sufficient service on the company; service of process at the head office abroad was unnecessary: *Newby* v. *von Oppen.* (4) It was essential that business for a substantial time should have been carried on here at a fixed place, and through some person who conducted it as the company's representative. These conditions fulfilled, the company was for that period treated as resident within the jurisdiction for the purpose of service of a writ. *Dunlop Pneumatic Tyre Co.* v. *Actiengesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (5) And Order IX., r. 8, which designates in such a case the proper officer to be served, applies "in the absence of any statutory provision regulating service of process" as much since the Act of 1907 as before it.

(1) [1923] 1 K. B. 673.
(2) [1904] 2 K. B. 495, 499.
(3) (1889) 23 Q. B. D. 519.
(4) (1872) L. R. 7 Q. B. 293.
(5) [1902] 1 K. B. 342, 349.

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The outstanding characteristic of these requirements is that any authorized service has to be made upon an officer—a head officer—whose knowledge will presumably be that of the company he represents—a very necessary qualification if a default judgment following upon a service, which necessarily can never be personal, is to have any extra-territorial recognition. The requirement, however, is based on a principle of much higher sanction. All provisions with reference to service of process upon artificial persons are adequate only to the extent to which in their effect they approximate to that produced upon an individual by service personally made upon himself. If they are without such effect, they have failed of their purpose and might as well never have been fulfilled.

I do not find that these very reasonable requirements of the ordinary law with reference to the service of process on foreign companies carrying on business in this country were an occasion of stumbling or embarrassment to intending plaintiffs. Sect. 35 of the Act of 1907 did not, so far as I can find, emanate from the mercantile community. Much more probable is it that the section as a whole was the work of the income tax authorities, and that when the position in this country of these foreign companies was being surveyed for other purposes the occasion was taken by sub-s. 1 (*c*) to select as a proper person for service of process on such a company, one whom the company was itself required to designate for that purpose. The selection was well made. In the general case such service would or should be effective to achieve the purpose of all such service. In few cases would it be legitimate for any company to complain if it had in the result been ineffective. But enough has been said to justify the doubt whether Parliament ever intended to authorize as sufficient in every case a service which in a particular set of circumstances would be no more than an idle ceremony. And if, in any case, such appears to be the proper description of a literal compliance with the section and a fortiori to the knowledge of plaintiffs who effected the so-called service, it may become very necessary to inquire

whether to such a case the section on its true construction has any application, and whether, if it has, its provisions are entitled, as applied to the case, to any extra-territorial recognition.

At the outset one thing with reference to s. 274 requires, I think, to be said. The purpose of the section, or, more properly, of s. 35 of the Act of 1907, was not, as for the first time, to lay down the conditions on which a foreign company might establish itself for business purposes here. I notice that Sargant L.J. in his judgment describes the Rossia Insurance Co. as one which, being desirous of carrying on business in this country, was "precluded from doing so by the Companies Consolidation Act, 1908, except upon the terms of complying with s. 274 of that Act." Bankes L.J. expresses the same idea in another way. "As a matter of international comity," he says, "I imagine that any civilized nation whose national takes advantage of our municipal law in order to secure a business footing in this country will observe and recognize the conditions upon which alone the national obtains that advantage." With unfeigned respect, I cannot agree that these are true views of the clause, and I feel very strongly that if they be not excluded from influence, the proper construction of the provisions of the section is likely to be endangered. Sect. 274 is in truth one of many scattered all over the Act, which impose a prescribed duty or obligation and secure the observance or performance of it by the imposition of penalties in case of default. Since the case of *Wright* v. *Horton* (1) the effect of these provisions of the Act has been free from doubt. Liability to the prescribed penalty is the only consequence of breach. If a limited company omits to keep a register of mortgages as required by s. 100 of the Act, the effect is not, as was before *Wright* v. *Horton* (1) wrongly supposed, to make the unregistered debenture even of a director invalid as a debenture. To take another instance, a limited company may acquire a right to protection of a trade name used separately from its

(1) (1887) 12 App. Cas. 371.

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corporate name although such user is in contravention of s. 63, which requires every such company to paint or affix its name on the outside of every office or place in which the business of the company is carried on: *Randall* v. *British and American Shoe Co.* (1) If a company again—a case even nearer the present—fails to have a registered office to which all communications and notices may be addressed or fails to give to the registrar notice of its situation, and of any change therein, all as required by s. 62, then another form of service than that prescribed by s. 116, which presupposes a registered office, will be permissible and resorted to—a useful fact to remember in connection with the present case. But the company will never, as a consequence, be restricted in the exercise of any lawful activity or hindered in the vindication of any of its rights. In all these cases—and there are many others—the company itself or its cognizant directors or managers or other officers or all of them are exposed to penalties, and usually for every day during which the particular default continues. But that is all. If non-compliance with any such requirement is to have further consequences, the section is careful to say so—as, for instance, where mortgages or charges created by a company registered in England or Ireland are not registered with the registrar within the time prescribed by s. 93. In that case not only are the company and every director, manager, secretary or other person knowingly a party to the default made liable for penalties under s. 99, but the mortgages or charges are by s. 93 itself made void, as charges, against the liquidator and any creditor of the company.

It will be seen that there is no such provision to be found in s. 274, which is well within the principle of *Wright* v. *Horton*. (2)

And, indeed, its limited effect upon the status in this country of the foreign companies to which it applies is well illustrated by the English history as disclosed in these proceedings of the Rossia Co. itself. That company has never failed to be in default under the section. It

(1) [1902] 2 Ch. 354. (2) 12 App. Cas. 371.

commenced business in this country in 1912; but no registration of any kind was made until December, 1917. Even then the registration was not complete. Never has there been filed a certified copy of the company's charter as required by sub-s. 1 (*a*), nor, I gather, a list of its directors under 1 (*b*), nor, at least since 1917, any statement in the form of a balance sheet as required by sub-s. 3 of s. 274. It appears, moreover, that certainly some, and it may be most or all, of the transactions which resulted in the present claims by the respondents against the company, and by the company against the appellants, were entered into when there was no registration at all. Certainly all of them were entered into when there was no sufficient registration. Yet no one suggests that these claims are for that reason unenforceable in this country, either against or by the company. Some one is liable for penalties in respect of these statutory defaults. That is all.

For myself, my Lords, in the determination of this difficult case—for so I regard it—all aid from the view, erroneous as I think, which strongly influenced at least Bankes L.J. must be disclaimed—namely, that s. 274 is entitled to special respect extra-territorially by reason of the idea that upon its terms alone does a foreign corporation "secure a business footing in this country."

My Lords, there is not now, I think, any doubt as to the real issue between the parties to this appeal. Garnishee proceedings are a form of execution, and an order absolute will not be made if the proceedings are based upon a judgment so open to question that any payment made by the garnishee to the judgment creditor would leave him exposed to a real and substantial risk of seeing, in this country, the judgment set aside, or in another country, of finding it not recognized, with the result in either eventuality that payment under the garnishee proceedings might be no discharge of his own debt.

Leaving for separate consideration the effect upon the whole case of the English winding-up order which had not been made when this matter was before the learned Master and the learned judge, that issue in the present case must,

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I think, depend upon the question whether the default judgment signed by the respondents in their action is one which on accepted principles of private international law would be recognized as valid by the Courts of any other country applying these principles. The relevant facts are simple. At the date of the writ in the action Mr. Collins' name placed there by himself acting on behalf and with the authority at the time of the Rossia Co. appeared on the file of the company at Somerset House as that of the person authorized to accept on behalf of the company service of process, as prescribed by sub-s. 1 (*c*) of s. 274. But the evidence, whatever else it may prove, does, to my mind, show that at the date of the writ Mr. Collins had neither de facto nor de jure any authority to represent for any purpose whatever the Rossia Co. as then constituted. And although he gave what according to the English view of the situation was a wrong reason for it, there was on the file a statement by his solicitor equivalent of effect. But the consideration which is more important still, is that the respondents before they proceeded to judgment were informed of what, as I think, has been shown to be the true position as between Mr. Collins and the Rossia Co. Notified by letter of June 6, 1923, from Mr. Collins' solicitor that, for the reasons there given, Mr. Collins had no authority to represent the Rossia Co., and that accordingly he returned the copy writ which had been sent to him by post, the respondents' solicitors on June 7 sent back the copy writ with the statement that they noted all that had been said and that in due course the Rossia Co. would no doubt look after their own interests. To this, on June 8, Mr. Collins' solicitor replied: "Mr. Collins is advised that he has no power or right at the present juncture to act for the Rossia Insurance Co. of Petrograd under the circumstances detailed in my letter to you of the 6th inst. I therefore return your copy writ and must, of course, leave you to take whatever steps you deem advisable." To which on June 11 there was this final reply: Mr. Collins "was the person nominated under the Companies Act to be served with process against the Rossia

Insurance Co. and was therefore served by us with the copy writ. We therefore do not wish to have the copy writ and return it to you and we must leave you to do what you like with it provided you do not return it to us." On the very next day the respondents signed judgment in default of appearance.

Such being the judgment on which these garnishee proceedings are based, the present question is whether any Court outside this kingdom is required by the comity of nations and on proof of these facts to recognize it. I cannot myself think so. Indeed, I am not entirely satisfied that the judgment would even here be held to have any validity if effective steps were taken to set it aside. It is clear that all the terms of s. 274 must not be taken literally. Suppose, for example, that the person named by a foreign company under sub-s. 1 (*c*) had died before issue of a writ against the company but that that writ had been served by being "addressed to" him "and sent by post to the address which has been so filed." Such service would be within the letter of the section. Would any Court in this country regard it as being within its intendment? I cannot think so. And what if the plaintiffs further knew that the person to whom they had addressed the writ was in fact dead? Is then the present case materially different, where the respondents in full knowledge of the position above stated signed judgment at a date when no kind of notice of the proceedings was or could to their knowledge have been given to any one really representing the company?

Ignoring any case of fraud or trickery—the Courts are strong enough to deal with any such case when it arises—I can myself see nothing in the statute which leaves the provision for service on the named person operative where that person himself, by notification to the registrar, makes it sufficiently plain that all his authority derived from the company is gone. Nor can I find anything in the statute to import that a name once placed on the file can only be superseded by the substitution of another name. This, as I have already suggested, cannot be the case where the

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named person dies. Again, I can find nothing in the statute to prevent Mr. Collins, who, duly authorized for that purpose, placed his own name on the file, from notifying with effect when his authority came to an end that his name must be withdrawn. If, as I believe, the form of service authorized by the section was intended to be effective service, it is easier to imply these things than to exclude them. The service upon the named person permitted by s. 274, sub-s. 3, is facultative ; it is not obligatory or exclusive, and if the true result of a breach of s. 274 is merely that which I have already suggested, then, just as the mode of service prescribed for foreign companies before the Act of 1907 remains applicable to those companies which do not comply with the section at all, so it is, as it seems to me, more in accord with principle, so soon as it is made apparent that the "name" is no longer an effective name for the purpose for which it was filed, to hold that service on the company must be effected as if the obligation now broken had never been performed at all, rather than to hold that a form of service known to the plaintiffs before judgment to be entirely ineffective as a service on the company, must be supported as being authorized by the section.

But if contrary to this view the terms of the statute are such as to justify such a service, and if in this country it must be recognized as valid, then just as I think no such service on an English company in a foreign country would in like circumstances be recognized here if that service were based upon a foreign statute to the like effect, so it cannot in my view be expected that any such service here if challenged by the company would be recognized in a foreign country, whether Russia or another. I cannot myself believe that it would by a foreign Court be held, that the placing of Mr. Collins' name on the file, as circumstances then were amounted to an agreement or submission by the company to be bound by service upon him in the circumstances with regard to the company and himself and the respondents as these existed and were known when the writ here was served and this default judgment was signed.

Accordingly if the case stood there I should be in agreement as to the proper result of this appeal with Scrutton L.J., Fraser J., and Master Ball.

The balance is, however, to my mind turned in favour of the respondents by the order of Romer J. winding up the Rossia Co., followed as it has been by the inquiry into the respondents' judgment debt made by the official receiver as liquidator and by his decision to take no steps to set it aside or question its propriety. The entire position is thereby, in my judgment, fundamentally changed. It is said that the petition to wind up was served on Mr. Collins just as was the writ in the respondents' action, and that the winding-up order can have no greater validity than the judgment, either in this country or abroad. My Lords, I do not agree. As might be expected from their nature, the permissible powers of the Court with reference to the service of winding-up proceedings, leading to an administration under the Court of a company's property, are wider than those in relation to the service of process leading to a judgment at the instance of an individual. Rule 28 of the Companies (Winding-up) Rules, 1909, will show the extent of the Court's powers in this matter. I cannot myself doubt that Romer J. was completely satisfied as to his power to make the winding-up order, and that the consequential proceedings at least as to all assets locally situate, and amongst these is included the garnishees' debt, are not only completely regular in this country but that they would, at any rate to the extent just stated, be recognized as regular everywhere. It is in the interests of the general body of British creditors regrettable, that the respondents did not themselves proceed by winding-up petition rather than adopt the course which they did.

In the result, however, and in view of the attitude of the official receiver, I think that any payment made by the appellants in the garnishee proceedings would be the equivalent of a payment made to the liquidator himself, and in my judgment the risk of such a payment being successfully questioned by any Court anywhere is too remote to be entitled to judicial consideration.

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On this ground, therefore, I am, as to the order absolute, in accord with the motion which has been made from the Woolsack. As to the other order appealed from, I am in entire agreement with the opinions expressed by all your Lordships.

Orders of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 29, 1926.

Solicitors for the appellants: *Watson, Sons & Room.*
Solicitors for the respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

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CLEMENT . . . . . APPELLANT;

AND

D. DAVIS AND SONS, LIMITED . . . RESPONDENTS.

Workmen's Compensation—Accident before and Death after Commencement of Workmen's Compensation Act, 1923—*Deduction of Payments made during Lifetime—Statutory Minimum payable to Dependants—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 1 (*a*) (*i.*)—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 24, *sub-s.* 2.

Sect. 24, sub-s. 2, of the Workmen's Compensation Act, 1923, which provides that "no deduction shall be made under para. 1 (*a*) (i.) of the First Schedule to the principal Act, as amended by section two of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds" does not apply to the case of a workman who was injured by accident before, and died as the result of his injuries after, the commencement of the Act.

Moakes v. *Blackwell Colliery Co.* [1925] 2 K. B. 64 followed.

APPEAL from an order of the Court of Appeal affirming an award of the deputy county court judge of Glamorganshire made under the Workmen's Compensation Acts, 1906–1923.

* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD WRENBURY, and LORD BLANESBURGH.

On March 13, 1925, the appellant filed a request for arbitration claiming, on behalf of herself and her children, the sum of 200*l.* as compensation in respect of the death of her late husband George Clement, a collier in the respondents' employment, who was injured by accident arising out of and in the course of his employment on November 28, 1918, and died on January 24, 1925, as the result of his injuries.

The respondents denied liability on the ground that, apart from payments made by them under the Workmen's Compensation (War Addition) Acts, 1917 and 1919, they had paid to the deceased in his lifetime by weekly payments the sum of 363*l.* 7*s.* 6*d.*, which they were entitled to take into account, and that, as that sum exceeded the sum of 300*l.*, there was no balance over for payment of compensation to the dependants.

The appellant contended that, having regard to s. 24, sub-s. 2, of the Workmen's Compensation Act, 1923, the respondents were not entitled to make deductions so as to reduce the amount of compensation payable to the appellant below 200*l.*

The deputy county court judge held, on the authority of *Moakes* v. *Blackwell Colliery Co.* (1), that s. 24, sub-s. 2, of the Workmen's Compensation Act, 1923, did not apply to the case of a workman who met with an accident before, and died after, January 1, 1924, the date of the coming into operation of the Act, and made an award in favour of the respondents.

The Court of Appeal (Lord Hanworth M.R., Scrutton and Sargant L.JJ.) affirmed the award of the learned judge.

1926. July 15. *Upjohn K.C.* (with him *A. T. James*) for the appellant. If the Act of 1906 applied to this case, as the weekly payments exceeded 300*l.*, nothing would be coming to the dependants. If the Act of 1923 applies the weekly payments are not to be taken into account so as to reduce the payment to the dependants below 200*l.* (s. 24, sub-s. 2). The Court of Appeal, on the authority of a previous

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decision of the same Court in *Moakes* v. *Blackwell Colliery Co.* (1), have decided that this particular provision is not retrospective. The Act of 1923, by s. 30, expressly provides that ss. 2 to 10, and the amendments of any scheme made in pursuance thereof, shall have no retrospective effect in this sense, that they shall not apply where the accident happened before the commencement of the Act. The fair inference is that those sections which are not expressly excluded from retrospectivity, in the absence of any language pointing in the contrary direction, apply to pending as well as to future cases. The question is whether the reference to s. 2 in the first part of sub-s. 2 of s. 24 alters the category of the whole sub-section so as to prevent the latter part of the sub-section from applying where the accident happened before, but death ensued after, the commencement of the Act. Inasmuch as s. 2 applies only to accidents happening after the commencement of the Act it follows that the first provision of the sub-section, i.e., the provision relating to children under fifteen years of age, only so applies. But the second provision of the sub-section is wholly independent of s. 2. The words in the sub-section as "amended by section two" mean where s. 2 applies. The sub-section contains two separate and distinct subject-matters, and it must be read reddendo singula singulis. There is no connection between the 200*l.* in s. 3, which increases the minimum payable to the dependants, and the 200*l.* in s. 24, sub-s. 2, which deals with the effect of the deductions upon that minimum. Sub-s. 3 of s. 24 clearly applies where the accident happened before the commencement of the Act. That points to the whole section being retrospective where the language admits of that construction.

E. W. Cave K.C. (with him *Victor Evans*) for the respondents. To affect the liability of an employer to pay for an accident which happened before the commencement of the Act very clear language should be used, and that has not been done. The sub-section provides that the deductions to be made under the principal Act shall not reduce the minimum

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payable to the dependants below 200*l.*, but in many cases the maximum payable under the principal Act was only 150*l.* That is an absurdity. The 200*l.* mentioned in the sub-section is the same 200*l.* as that mentioned in s. 3 of the Act.

Upjohn K.C. replied.

The House took time for consideration.

1926. Oct. 28. VISCOUNT DUNEDIN. My Lords, George Clement, the husband of the appellant, was employed by the respondents as a collier, and on November 28, 1918, personal injury was caused to the said George Clement by accident arising out of and in the course of his employment. The respondents admitted their liability under the Workmen's Compensation Act, 1906, to pay compensation to the said George Clement in respect of the said injury, and paid him compensation from the said November 28, 1918, to the date of his death, which occurred on January 24, 1925. These payments were between the said November 28, 1918, and the said January 24, 1925, a total sum of 533*l.* 18*s.* 5*d.*, being as to the sum of 363*l.* 7*s.* 6*d.* part thereof weekly compensation at the rate of 1*l.* per week from November 28, 1918, to January 1, 1924, and at the rate of 1*l.* 15*s.* per week from January 1, 1924, to January 24, 1925, and as to the sum of 170*l.* 10*s.* 11*d.*, the additional compensation payable to the said George Clement under the provisions of the Workmen's Compensation (War Addition) Acts, 1917 and 1919.

The appellant, after the death of her husband, filed a request for arbitration, claiming for herself and dependants the sum of 200*l.* The respondents did not admit that any sum was due, the sum already paid to George Clement in his lifetime having exceeded 300*l.* and being deductible from the compensation otherwise payable on his death to his dependants under the provisions of para. 1 (*a*) (i.) of the First Schedule to the Act of 1906. That section is as follows :—

" (1.) The amount of compensation under this Act shall be (*a*) Where death results from the injury—

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"(i.) If the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years, shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer."

The appellant founded her claim on s. 24, sub-s. 2, of the Act of 1923. Sect. 24, sub-s. 2, is as follows :—

"(2.) No deduction shall be made under paragraph 1 (*a*) (i.) of the First Schedule to the principal Act, as amended by section two of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds." And

"(3.) Paragraph 1 (*a*) (iii.) of the First Schedule to the principal Act shall have effect as if 'fifteen pounds' were substituted for 'ten pounds.'" This last sub-section referred to burial allowances.

The sole question in this case is therefore whether sub-s. 2 applies to the case of liability arising out of an accident which occurred before the coming into operation of the Act of 1923, to wit, January 1, 1924. The learned arbitrator and the Court of Appeal, both finding themselves bound by the judgment of the Court of Appeal in the case of *Moakes* v. *Blackwell Colliery Co.* (1), by the same Court of Appeal, decided against the appellant. The present case is therefore an appeal against the decision in *Moakes'* case, in which

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case the opinions of the learned judges of the Court of Appeal will be found.

The other sections of the Act which must be quoted are ss. 2 and 30.

Sect. 2 of the Act of 1923 provides under (*a*) and (*b*) certain additional benefits to the scale of compensation under the additional Act, and in a proviso says that the total amount of compensation payable to the dependants shall in no case exceed 600*l*.

Sect. 30 provides that the provisions of ss. 2 to 10 of the Act shall not apply to any case where the accident happened before the commencement of the Act.

The terms of the Interpretation Act have been prayed in aid by some of the learned judges. Strictly speaking, it does not apply, as it only deals with repealing Acts, not with amending Acts, but in truth that matters not, for the Interpretation Act is only putting into statutory form a canon of construction which would be applied independently of it. When you are construing an Act which makes changes in the law, which changes can be well referred to what the law is to be after the passing of the Act, you will not construe the words unless they are clearly to that effect so as to upset vested rights and liabilities which are complete in themselves. Applying that canon to the construction of the provisions now in question, one finds that, in the case of accidents arising out of and in the course of employment in the past, certain rights and certain liabilities accrue at once to the workman and his dependants on the one hand and the employer on the other. The exact pecuniary amount had to depend on the particular circumstances of the quality of the injury, the supervention of death, and the state of the workman's family, but the method of calculation was fixed once and for all, and therefore it would not be probable that an Act which was greatly extending benefit and liability would apply to the accidents of the past, and s. 30 makes this quite clear to a great extent by expressly declaring that the additional benefits conferred by ss. 2 to 10 are not to enure to any class arising out of accidents in the past. This, however, is only

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a general proposition. If the words are clear they must be given effect to, although they may lead to a result the opposite of that antecedently expected.

Now, the argument of the appellant has two main points: she says, first, that s. 30 excludes as regards past accidents ss. 2 to 10, but it does not mention s. 24, sub-s. 2, and she says, secondly, that s. 24, sub-s. 3, clearly applies to present accidents and that therefore prima facie the whole section so applies. Now, an argument based on the brocard "Exclusio unius est inclusio alterius" when applied to sections of an Act of Parliament is only powerful when the section which is sought to be included is so framed that it needed an exclusion; if in its terms it is so conceived as not to be included, then the argument has no weight, and here it is that the second argument hurts the first. Sect. 24, sub-s. 3, is expressed absolutely without any reference to the excepted sections, and there is no reason why it should not apply in terms to all accidents. Therefore, says the appellant, the whole sub-sections should so apply. But s. 24, sub-s. 2, has a marked difference of expression, and by reference includes some of the sections excepted in the case of old accidents.

My Lords, I am of opinion that the result come to by the Court of Appeal is right. The direction as to a deduction not being allowed to reduce the amount payable to less than 200*l.* is only a deduction which is to be made from the sum calculated on para. 1 (*a*) (i.) of the First Schedule as amended by s. 2, and the Schedule as amended by s. 2 is a Schedule which can only apply to new accidents, because the amendments effected by s. 2 are specifically excluded from applying to old accidents.

I am therefore of opinion that the proper interpretation of the section is in accordance with, and not against, the antecedent probability of what would have been expected. I move, therefore, that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree. If the appellant's view were correct it is clear that the financial results of accidents would be so far, and, it might

be, seriously, altered. The business advantage and sound principle of accounting, of being able to understand the scope and, so far as may be, the extent of liability dependent on past occurrences, and to frame accounts and estimates accordingly, would be pro tanto destroyed.

Of course this may be upset by ex post facto legislation. The presumption against that is well known and approved. That presumption may of course be overridden by express statutory provision. I do not think that there is such an express provision in the present case.

LORD SUMNER (read by LORD SHAW OF DUNFERMLINE). My Lords, the event out of which liability under the Workmen's Compensation Acts arises, is the injurious accident in the course of the workman's employment. In the present case this happened in 1918. The appellant's husband, the injured workman, died after the amending Act of 1923 came into operation. Under this Act, by s. 24, sub-s. 2, "no deduction shall be made under paragraph 1 (*a*) (i.) of the First Schedule to the principal Act, as amended by section two of this Act in respect of the amount of any weekly payments made under the principal Act, so as to reduce the amount payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds." The appellant claims the benefit of this sub-section. She has therefore to show, that the Act of 1923 is retrospective so as to apply these new provisions to a case in which the initial injury was sustained before the Act came into force, and that it alters the provisions of the Act of 1906, under which the sum payable on death might be exhausted by previous weekly payments, which were to be set off against it.

By the general rules for the construction of statutes the Act of 1923 is presumed not to be retrospective. If it were so, the effect would be to make a serious change for the worse in the position of the employer by mere implication. Before that Act an employer, who had on his books a continuing present liability to make weekly compensation

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payments to an injured man, would also, week by week, be entitled to write down pro tanto the contingent liability, which would accrue in the event of that workman's death. In the present case the employor had thus written it off altogether. Week by week his payments had vested in him a corresponding right—a diminution of his contingent liability until it reached zero. Unless the Act of 1923 somewhere clearly states that the earlier legislation, under which that result had been automatically brought about before the Act of 1923 came into force, is retrospectively altered by its provisions, I am of opinion that the statutory presumption against a retrospective operation must prevail.

My Lords, after careful consideration, I have not been able to construe the Act of 1923 in the way which the appellant's case requires. Neither the fact, that some sections are expressly stated not to be retrospective, among which the section in question is not mentioned, nor the fact, that the allowance for funeral expenses, payable on the death of the injured workman, has been increased, in terms which, without deciding it, I will assume to apply to the death of a workman after the commencement of the Act from injuries received before it, appears to me to produce the result for which she must contend. The first provision does not necessarily involve that the Act is generally retrospective, except as to the named exceptions. The second is obviously intended to meet the well known increase, which has taken place in the cost of the necessaries of life and of death also. I think the case of *Moakes* v. *Blackwell Colliery Co.* (1) was rightly decided, and in this opinion I am confirmed by the fact, that in the case of *Talbot* v. *Vickers, Ld.* (2), reported in the same volume, two Lords Justices, who were not parties to the earlier decision, specially expressed their agreement with its reasoning instead of merely bowing to its authority.

Accordingly, my Lords, I think that this appeal fails.

LORD WRENBURY. My Lords, the accident having taken place on November 28, 1918, and death having ensued on

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January 24, 1925, the question is whether upon the true construction of s. 24, sub-s. 2, of the Workmen's Compensation Act, 1923, deduction is or is not to be made so as to reduce the amount payable to the dependants. Under the Workmen's Compensation Act, 1906, Sch. I. (*a*) (i.), deduction would be made. If s. 24, sub-s. 2, of the Act of 1923 applies it will not. The accident being before and the death after the date at which the Act of 1923 came into operation—namely, January 1, 1924, the question is whether deduction is to be made or not. The applicant says that s. 24, sub-s. 2, of the Act of 1923 applies and that deduction is excluded.

On looking through the Act of 1923 I find that a principal purpose of the Act is to enlarge the benefits which the workman and his dependants are to have. Sects. 2 to 6, both inclusive, are all to this effect. They form a group under the heading "Amendment of benefits under principal Act." Sects. 7 to 10, both inclusive, deal with some further advantages to be given to the workman. But s. 30 of the Act provides that ss. 2 to 10 shall not apply when the accident happened before the commencement of the Act. The additional benefits created by the Act by the sections above mentioned are therefore not to be enjoyed when the accident was before the Act. It is with this in view that I come to look at s. 24, sub-s. 2. Am I to read that section as applicable to every case, including that in which the amendment made by s. 2 of the Act of 1923 does not apply—or in other words including that in which the benefits to be enjoyed by the workman are not enlarged—or am I to read it as confined to the case in which s. 2 of the Act does apply and the Act is enlarging the benefits which the workman is to enjoy? My Lords, I think I must do the latter, and must read s. 24, sub-s. 2, as if after the words "as amended by section two of this Act" there were inserted the words "in any case to which the amendment made by section two of this Act applies."

The intention of the Act, in my judgment, is that where the accident happened before the Act neither the increased

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benefits given affirmatively by ss. 2 to 6 nor those resulting from the absence of deduction under s. 24, sub-s. 2, shall be enjoyed by reason of the accident.

For these reasons I am of opinion that this appeal fails.

LORD BLANESBURGH. My Lords, it is clear on a careful consideration of the terms of para. 1 (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1906, that while there is no fatal accident to a workman in respect of which the sum payable under that Act on account of dependants can exceed 300*l.*, the sum of 150*l.* mentioned in the paragraph represents in the case of very many such accidents the maximum amount so payable. And in arriving at these maxima any payments under the Act made to the injured workman himself before his death in respect of the same accident and whether in the form of weekly payments or a lump sum are to be brought into account by way of deduction. If these simple facts are borne in mind, they will, I believe, be found to supply the clue to the solution of the problem in this case presented to the House.

My Lords, the Act of 1923 modified or amended that para. 1 (*a*) (i.) of the principal Act in several respects, two of which are here relevant. First of all, that Act provided—and the form of words may be found to be material—that the paragraph in question "shall have effect as if for the words 'one hundred and fifty pounds' there were substituted the words 'two hundred pounds'": s. 3. That is to say the sum of 200*l.* was to take the place of the 150*l.* already referred to. Secondly, the total amount of compensation payable to the dependants might now reach, but was in no case to exceed, 600*l.*: s. 2.

But these variations or amendments of the principal Act, contained as they were in ss. 3 and 2 of the Act of 1923, are not, as a result of s. 30, to apply to any case where the accident happened before the commencement of that Act, that is to say, before January 1, 1924. Accordingly, it being conceded by the appellant that no claim to any further compensation is now competent to her under para. 1 of the First Schedule

to the principal Act—and it is not suggested that any claim is competent to her under any other provision of that statute—it follows that her present claim can only be made good if it is brought within some provision of the Act of 1923 which does not in turn presuppose alterations or amendments of that paragraph, operative only with reference to an accident happening after the commencement of the later Act.

The only provision of the Act relied upon for this purpose is s. 24, sub-s. 2. The true effect of that sub-section in the light of the facts already stated becomes accordingly in the result the one question at issue upon the appeal. For convenience of reference, I venture again to transcribe the sub-section at length: "No deduction shall be made under paragraph 1 (*a*) (i.) of the First Schedule to the principal Act as amended by section two of this Act in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds."

My Lords, in terms, that sub-section in the first branch of it applies only to the provisions of para. 1 (*a*) (i.) of the First Schedule to the principal Acts as amended by s. 2 of this Act." That branch at any rate has no application to any accident which happened before January 1, 1924. The only question therefore which remains is whether the 200*l.* referred to in the second branch of the sub-section is in like case as being, in truth, none other than the 200*l.* referred to in s. 3 of the Act, or whether it is a new sum now mentioned for the first time and only accidentally coincident with the 200*l.* which by s. 3 is in para. 1 (*a*) (i.), and in relation only to accidents on or after January 1, 1924, to be substituted for the original 150*l.*

My Lords, to the question so presented it appears to me there can be only one answer. The sub-section in this second branch of it is dealing with a "principal Act" which imposes, as a relevant liability in every case exigible, a sum of at least 200*l.* The deduction in respect of weekly payments is not

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to "reduce" the amount payable under the principal Act below 200*l.* Such a provision is inapplicable to an Act under which no more than, say, 150*l.* may, in this behalf, be payable.

That this was the position under the principal Act, unamended by the Act of 1923, I have already shown. A "principal Act" with a liability in the same behalf extended to 200*l.* is only brought into existence by s. 3 of the Act of 1923, and then exclusively in relation to accidents of which the fatal accident to the workman here was not one.

Accordingly, my Lords, it appears to me to be clear that the sum of 200*l.* mentioned in this sub-section can be none other than the 200*l.* referred to in s. 3 of the Act, and that the second branch of the sub-section does not any more than does the first apply to accidents which happened before the commencement of the Act. If a further reason in support of this conclusion be needed it will be found in this consideration that the alternative construction would, in effect, write out of the Act as otiose the express provision of s. 30, by virtue of which s. 3 has no application to any such accidents. Possibly the particular phraseology of s. 3 may explain why it is that what is in effect an amendment thereby made in para. 1 (*a*) (i.) of the principal Act is not in s. 24, sub-s. 2, so referred to.

It was, my Lords, conceded by Mr. Upjohn that if, on construction, the figure of 200*l.* mentioned in this sub-section could be held to have direct reference to the "two hundred pounds" in s. 3, the case of the appellant was at an end. His contention, of course, was that the two sums were only accidentally identical and had no connection the one with the other. That contention is, in my judgment, and for the reasons I have given, erroneous, and on this short ground I am of opinion that the decision of the Court of Appeal in *Moakes* v. *Blackwell Colliery Co.* (1) was right.

There are other and more general grounds upon which, as it also seems to me, the same conclusion may be reached. But I prefer to rest my judgment on what appears to be a neat point of construction.

(1) [1925] 2 K. B. 64.

This appeal should, I think, be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Oct. 28, 1926.

Solicitors for the appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for the respondents: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

[HOUSE OF LORDS.]

GLICKSMAN (PAUPER) . . . . . APPELLANT;

AND

LANCASHIRE AND GENERAL ASSURANCE COMPANY, LIMITED . . . } RESPONDENTS.

Insurance (Burglary)—Proposal Form—Proposal by Partners—Questions in Proposal Form—Basis of Contract—Misstatement—Non-disclosure and Concealment—Materiality—Refusal of former Proposal made by one Partner.

Two partners, the appellant and another, desiring to insure their stock in trade from loss by burglary in the premises on which they carried on business, signed and tendered to an insurance company a proposal form after filling with their names a space left in the form for "Name of Proposer." The form contained several questions, including (*d*), which with the answer of the partners was: Has any company declined to accept, or refused to renew, your burglary insurance? If so, state name of company. (Answer) Yorkshire accepted, but proposers refused. The partners also signed a declaration at the foot of the form, pledging themselves that the answers to the questions were true, and that they had withheld no information that might tend to increase the company's risk, and agreeing that the declaration and answers should be the basis of the contract between them and the company, and further agreeing to accept a policy subject to the usual conditions prescribed by the company. The proposal was accepted and a policy was issued, wherein the partners were called the assured, containing a

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proviso that the statements made by the assured in the proposal and declaration were true in all respects, and that if the policy were obtained through any misrepresentation, suppression, concealment, or untrue averment whatsoever by the assured, then the policy should be void.

The fact was that an insurance company other than the company mentioned in the answer to question (*d*) had refused a proposal for a burglary insurance made by the appellant on a former occasion when he was carrying on the same business alone upon the same premises.

During the currency of the policy the appellant, who was again carrying on the business alone, and in whom the benefit of the policy was then vested, made a claim in respect of a burglary committed on the premises. The insurance company resisted the claim and the dispute was referred to arbitration under the terms of the policy. The arbitrator, by an award stated in the form of a special case, found that a false answer had been given to question (*d*), and that the policy had been obtained by suppression or concealment of a material fact:—

Held, that there was sufficient ground for supporting the finding of the arbitrator that the refusal by the insurance office of the proposal made by the appellant on the former occasion was a material fact, and that that fact had been concealed.

Decision of the Court of Appeal [1925] 2 K. B. 593 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Roche J. upon a special case stated by an arbitrator.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

The arbitrator, by an award stated in the form of a special case, awarded, subject to the opinion of the Court, that the respondents, the Lancashire and General Assurance Co., Ld., were under no liability to the appellant, the claimant.

Roche J. decided in favour of the claimant, but his decision was reversed by the Court of Appeal (Bankes, Scrutton and Sargant L.JJ.).

Croom-Johnson and *Claud Mullins* for the appellant. As to misrepresentation: the answer to question (*d*) may be incomplete, but it is not untrue. The question is addressed to the firm, and it relates to insurance by the two partners. As to concealment: the mere fact that the appellant's proposal had been refused by the Sun Insurance Office, without proof of anything further, is not a material circumstance.

(1) [1925] 2 K. B. 593.

[They cited *Joel* v. *Law Union and Crown Insurance Co.* (1); *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (2); *Becker* v. *Marshall* (3); *Ehrig* v. *Transatlantic Fire Insurance Co.* (4)]

[LORD SHAW referred to *Bates* v. *Hewitt.* (5)]

Rayner Goddard K.C. and *H. C. Dickens* for the respondents were not called upon.

VISCOUNT DUNEDIN. My Lords, one Sapsy Glicksman, a small ladies' tailor, insured against burglary his stock in trade. A burglary happened and a large portion of his stock in trade was taken away, but upon his applying to the insurance company for the insurance money he was met by the allegation that there had been no burglary and no stock in trade. They went to arbitration, and here is what the learned arbitrator said: "On the hearing of the reference during the opening of the case for the claimant, counsel for the respondents stated to me that the only point he intended to raise was that there had been no burglary as alleged by the claimant and that the goods for which the claim was made were not upon the said premises at the date of such alleged burglary and had not been removed or stolen by burglars as alleged." That was a very serious accusation. It was an accusation which, if it were true, would have put the man in prison. I remember myself giving somebody three years' penal servitude for exactly the same sort of thing. Here is what the arbitrator said about it: "I find that the goods in respect of which the claim was made were upon the said premises at such date and were stolen and removed by burglars as alleged by the claimant, and that the claimant thereby suffered loss and damage to the amount of 1656*l.* 6*s.* 3*d.*" But, in the course of the examination of the claimant, in answer to some more or less casual questions, it seems that he said that he had been turned down by another office, and thereupon the insurance company remembered that he had, like

(1) [1908] 2 K. B. 863, 878, 881, 883.

(2) [1891] A. C. 485.

(3) (1922) 11 Ll. L. Rep. 114, 118.

(4) Transvaal L. R. [1905] T. S. 557.

(5) (1867) L. R. 2 Q. B. 595, 607.

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other people, signed a paper when he made application for insurance, and accordingly they asked leave and got leave to put in an amended point of defence. The amended point of defence was: "It was warranted by the policy that the statements made by the applicant in his proposal in writing dated November 9, 1922, were true in all respects, and that if the policy should be obtained through any misrepresentation, suppression, concealment, or untrue averment"—it should be absolutely void. Then it was said that he had, as a matter of fact, in answer to a question: "Has any company declined to accept or refused to renew your burglary insurance?" said: "Yorkshire accepted, but proposers refused on account of fire proposal"; whereas, in fact, in a written proposal dated June 19, 1919, the applicant had offered his burglary insurance to the Sun Insurance Office and the said Sun Insurance Office had declined it. It was not quite plain sailing even then, because when the proposal came to be looked at it was found that at the time the proposal was made he was in partnership. The word "you" in English is either singular or plural, and when you come to the answers to the questions there is, what I may call, a somewhat inextricable confusion between the singular and the plural. Of course, literally speaking, if the word "you" is used in the plural, as naturally it should have been because two people were applying, then it was quite true that there had not been any refusal of an insurance; but it was not true if you take it in the singular. The arbitrator came to the conclusion that it voided the policy and an appeal was taken on a stated case to Roche J. Roche J. came to an opposite conclusion—I do not altogether wonder when one thinks of the scene: On the one hand Mr. Cohen, agent for the insurance company, keen, as he was quite entitled and bound to be, to get business for the insurance company, and, on the other hand, this wretched little ladies' tailor of whom the arbitrator tells us that he could neither read nor write and could only sign his name, and whose natural and best language was Yiddish and not English—surely an impar congressus. Roche J. held that there was no proof of concealment; and

he held upon the other question that the answer was really made in the plural.

My Lords, for the reasons that I shall presently state, I am unable to agree with Roche J., but at least I am left with this impression, that those—shall I call them attractive?—qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.

Then I come to the law of it. The law has often been stated, but perhaps it is just as well to state it again. A contract of insurance is denominated a contract uberrimae fidei. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but quite apart from that, and alongside of that, there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk. Now, as I have said, upon this proposal two questions arose. First, the question arose upon what I call the plural and the singular. One of the learned judges in the Court of Appeal has said that he would like further to consider this. Roche J. decided it in the sense that the question was really put in the plural, and that therefore there was no untrue answer. There were certain cases quoted to us which go to the same view. Two of the learned judges in the Court of Appeal took the other view. My Lords, I do not think it necessary that we should come to a conclusion on which of these views is right, and I therefore do not propose myself to express any opinion upon them, because I think the ground of judgment is quite clear on the other point. It is narrow enough, because when you come to the law as to materiality and concealment, of course there are certain circumstances which are so obviously material that it will not be taken from any man to say that he did not know it. If you are insuring a ship on a time policy and that ship had been badly knocked about three

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weeks before, of course you could not be heard to say that you did not think that was a material circumstance. But here the whole point really comes to turn upon this—and this is the ground of the judgment of the learned judges in the Court of Appeal—that, never minding the singular or the plural, the fact that a question of this sort was put showed that the insurance company thought it was material whether a proposal had been refused or not, and that that was brought to the knowledge of the claimant. My Lords, under the circumstances I have considerable doubts, but then I am not entitled to take any view of my own on that, because that is a fact and the arbitrator has found it as a fact and I cannot get beyond the arbitrator's finding. I think that the reasoning of the learned judges in the Court of Appeal is impeccable. This was brought to the knowledge of the claimant that it was a material fact, and he certainly did not disclose it, and, therefore, the policy is void.

Therefore, my Lords, with unfeigned regret, I move your Lordships that this appeal be dismissed with such costs as there are in a case in forma pauperis.

LORD ATKINSON. My Lords, I concur. I wish to say one word in reference to the observations of Scrutton L.J. I think it is a lamentable thing that insurance companies will abstain from shaping the questions they put to intending insurers on these occasions in clear and unambiguous language. For instance, in this particular case, all that it was necessary to ask was: "Did you two or either of you make an application to the Sun Insurance Co. for a policy against burglary?" This whole case and all the expense incurred in it would have been prevented had that simple method been adopted.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with both the judgments just delivered.

LORD WRENBURY. My Lords, it is with the very greatest reluctance that I concur in the motion which is proposed from the Woolsack. I think it a mean and contemptible

policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground which no one says was really material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, avail themselves of what seems to me the contemptible defence that, although they have taken the premiums, they are protected from paying.

LORD CARSON. My Lords, without committing myself to the strictures passed upon the respondent company, I concur in the conclusion arrived at that the appeal should be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed.

Lords' Journals, Nov. 4, 1926.

Solicitor for the appellant: *F. J. Rutledge.*
Solicitors for the respondents: *Coward, Chance & Co.*

[HOUSE OF LORDS.]

OWNERS OF S.S. AUSTRALIA . . . APPELLANTS;
AND
OWNERS OF CARGO OF S.S. NAUTILUS RESPONDENTS.

[H. L. (E.)* 1926 *June* 11.

THE AUSTRALIA.

Shipping—Collision—Nautical Assessors, Position of.

The Court is not bound to take the advice of its nautical assessors, but must make up its own mind on questions of nautical skill and seamanship.

Nautical assessors advising the Court of Appeal have no higher authority than those advising the Court of first instance, and where the two pairs of assessors differ the Court must make its own choice. If the Court is unable to decide whether the advice it receives is sound, the position is that the point is not proven and that the loss must fall upon the party who bears the burden of proof on that particular issue.

* *Present:* VISCOUNT DUNEDIN, LORD SUMNER, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

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1926
OWNERS OF S.S. AUSTRALIA v. OWNERS OF CARGO OF S.S. NAUTILUS.

APPEAL from an order of the Court of Appeal varying a judgment of the President.

The respondents were the plaintiffs and the appellants were the defendants in an action which arose out of a collision which took place in the River Scheldt at 8 P.M. on January 20, 1923, between the appellants' steamship *Australia* and the steamship *Nautilus*, on which the respondents' cargo was laden. The *Nautilus* sank as the result of the collision.

The President found, first, that the *Australia* was in fault for being on the wrong side of the river, and as to this there was no appeal; secondly, in accordance with the opinion of his nautical assessors, that the *Nautilus* was also to blame for not reducing her speed.

The Court of Appeal (Bankes, Atkin and Sargant L.JJ.), acting on the opinion of their nautical assessors, who differed from the nautical assessors in the Court below, found that the *Nautilus* was not to blame.

The facts are fully stated in the opinion of Viscount Dunedin. The case is reported only for the observations of their Lordships upon the respective rôles of judge and nautical assessors.

1926. April 19, 20. *Stephens K.C.* and *Darby* for the appellants.

Dunlop K.C. and *Dumas* for the respondents.

The House took time for consideration.

1926. June 11. VISCOUNT DUNEDIN. My Lords, the story of the collision which is the origin of this case can be told in a very few words, though the case itself has given rise to a sharp difference of opinion. The ship of the appellants, the *Australia*, was proceeding up the Scheldt, on January 20, 1923, to Antwerp. The ship of the respondents, the *Nautilus*, was coming down. It was 8 P.M., and consequently dark. The Scheldt at the place in question forms a sharp turn which may be conveniently likened to the curve of a fish hook when laid on its side and looked at. The

Nautilus was coming from the shank with the tide, which was ebbing. The *Australia* was coming from the barb, which I assume to be on the left. The *Australia* was going to enter a sluice called the Royers sluice, which was situated just where the curve of the hook begins, and consequently on the port side of the channel as looked at from the deck of the *Australia*. She had anchored down stream because the dock was full, but about 7.15 she got notice that the dock was ready to receive her. A tug came down, and about 7.30 she got under way. She was passed by a ship called the *Auckland Castle* which had come out of the Royers sluice. In order to get into the sluice quickly she left her proper water, which was on the starboard side of the channel, and her invasion into the port side was increased by the fact that she sheered and the ebb tide drove her farther in. This happened when she was about half a mile from the Royers sluice. Now the *Nautilus* had been approaching the bend when she saw the *Auckland Castle* coming out of the Royers sluice, and she moderated her speed in consequence, but after the *Auckland Castle* had gone away she resumed her full speed round the corner. Before she got to the corner she saw the lights of the *Australia* across the land. She therefore knew she would have a ship to pass. She sounded one blast and was answered by one blast. That meant at that time that she was going to pass port to port, but when she got round the corner she saw the green light of the *Australia*. That meant that the *Australia* was on the wrong side, and at the same time the *Australia* sounded three blasts, that is to say, that she was going astern. The *Australia* did so because when she saw the *Nautilus* and knew that she herself was over on the wrong side she thought she had better stop if possible, and then, after a very short interval, she sounded three blasts again, and then, after a time that has been variously estimated at from one to two minutes, came the collision in which the *Nautilus* was sunk. Now, the learned President who tried the case came to the conclusion that there was no doubt as to the fault of the *Australia*. She had got into the wrong water for her own purposes,

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and she was therefore in fault. No appeal was taken by the *Australia* against his judgment so far as it found her in fault; consequently there could be no question as to that before your Lordships. But then there was the further question: Was the *Nautilus* also in fault and did that fault contribute to the collision? The President consulted his assessors, and they answered him that as a matter of seamanship it was wrong for the *Nautilus* to come round the bend at full speed—7 knots plus the tide, which was reckoned at 3, or, in all, 10 knots over the ground. The *Nautilus*, they considered, after she had checked her speed to allow of the *Auckland Castle* to proceed, ought not subsequently to have increased her speed but really rather to have lowered it, keeping in view that she knew she had a vessel to pass, and, further, they considered that it was quite wrong to go on at full speed when those on board of her became conscious of the fact that the *Australia* was in front of them and on the wrong side of the river—for it was proved that they never saw the red light of the *Australia* till a moment before the collision—and when they heard the repeated three blasts showing that the *Australia* thought that something ought to be done. Had the *Nautilus* acted properly in either of these matters they were of opinion that the collision would not have happened. Accordingly the learned President held the *Nautilus* also to blame.

The case went to the Court of Appeal. Their Lordships did not differ from the conclusion of the learned President as to the facts of the case, except in so far as they thought that the time which elapsed between the last three blasts and the collision was more likely to be the short time of one minute than the longer time of two minutes. But they then put just the same question to their nautical assessors as had been put by the learned President to his nautical assessors, and received answers to exactly the opposite effect. Upon this the Court of Appeal reversed the judgment of the President, saying no doubt that they were themselves inclined to agree with their assessors, but at the same time

saying frankly that but for that advice they would not have ventured to disturb the judgment given.

My Lords, in these circumstances we thought it necessary to put to our nautical assessors the same questions, and they gave the same advice as the learned President had received; one of them, indeed, was not as strong as the other on the mere question of the speed round the point per se, but both were very determined as to the fault, which consisted in not slackening speed when the position became apparent and still more when the three blasts were heard.

My Lords, this sharp divergence of opinion among the skilled assessors who have assisted the various Courts has more than once given cause for comment. Speaking for myself, I come to the same conclusion as the majority of assessors here have come, and I should have done so unassisted by the opinion of any assessor. But as it stands, the case raises in an acute form the propriety of what has been called an appeal from assessors to assessors. I do not know if anything more useful can be said than what was said by Birkenhead L.C. in the case of *The Melanie*. (1) And I gather that his remarks had the concurrence of the present Lord Chancellor, and were also agreed to in another case by Lords Buckmaster and Phillimore. Yet I do think it necessary to protest against a view which if I am not doing them injustice, has seemed to prevail in the Court of Appeal in a recent case, to wit, that the Court is bound to pay more attention to the opinion of its own assessors than to that of those who advised the Court below. There is no hierarchy of assessors. They occupy much the same position as do skilled witnesses, with this difference, that they are not brought forward as the partisans of the one side or the other. And just as for instance in a patent case the Court must make its own choice between the views that may have been put forward by one witness or by another, so if assessors differ, the Court must make its own choice. In every case the responsibility is with the Court. Personally, I think

(1) Reported, post, p. 162n.

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that while assessors may be used to the full for information, it is a pity, if it can be helped, to put a question to them in such a shape that it is tantamount to asking them whether they would find for the plaintiff or for the defendant. I cannot forget that when assessors were introduced, ships were sailing ships, and the navigation of a sailing ship is an art which the landsman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word. So that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as possible. Certainly to find, as we have found not only in this case but in several cases which have lately occupied your Lordships' attention, that the different assessors are at variance is much more of a hindrance than an assistance.

I move that the appeal be allowed and the judgment of the President restored, the appellants to have the costs in the Court of Appeal and in this House.

LORD SUMNER. My Lords, there is but little doubt or controversy about the circumstances of this collision. The relative positions of the two vessels when the *Nautilus* first saw the *Australia* and heard her first three-blast signal, their distances apart, bearings and courses, the manœuvres of the *Australia* and the speed of the *Nautilus*, and finally the force of the tide and the configuration of the channel were all such as made it easy to state to the assessors the assumptions on which they were to consider the questions put to them. These were questions of nautical skill and of seamanlike prudence and judgment, and on the view which, under advice given upon them, your Lordships may see fit to adopt, the decision of this appeal depends.

Their advice was, I confess, not what I had expected, nor, as it appeared to me at the time, such as I was much disposed to accept. They said that, under the circumstances, it was unskilful and unseamanlike for the *Nautilus* to keep her

speed, and that but for this error the collision would not have occurred.

A mere lawyer, my Lords, might well be forgiven, if he felt unable to set his own opinion against that of assessors on so professional a matter. The fact that the Court of Appeal had been advised to the contrary by equally competent advisers might well increase his embarrassment, and when it is remembered that the Trinity Masters had advised the learned President in the sense in which the House is now advised, he might be tempted in his perplexity to renounce the task of judgment.

This, however, is exactly what he must not do. Technical advisers are not the judges even of such issues as these. The appointed Court must exercise its function of deciding, and find consolation in a consciousness at any rate of blank impartiality. An opposite road of escape might seem to open—namely, that of accepting, as of course, the advice of the assessors consulted, who are provided for that very purpose by the law itself. In reality there is no escape here. This is what leads to the "intolerable situation," as it is called, of "appeals from assessors to assessors." After all, the technical advice given below is advice available for the consideration of the appellate tribunal, as well as that given by its own assessors. The latter are not substituted for those previously consulted; they are additional to them, and, if one adviser or two advisers are to be preferred, it is because in the judgment of the Court the advice given is such as, in itself, is the more acceptable.

My Lords, the phrase "an appeal from assessors to assessors," which has been much used recently (*The Melanie* (1) —collision action, May 15, 1919; *The Melanie* (2)—salvage action; *The Artemisia*, House of Lords, July, 1925 (3)), pungent as it is, requires some examination. Strictly it is a figure of speech, for there is no such thing as an appeal either from or to assessors. It is really a criticism of the

(1) (1919) 35 Times L. R. 507. Reported, post, p. 162n.
(2) [1925] A. C. 246.
(3) Reported, post, p. 164n.

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conduct of one Court or of both Courts below. It specially describes the effect on an appeal, when an appellate tribunal adopts a certain attitude towards its assessors, an attitude which is equally open to criticism in a Court of first instance. That attitude is the Court's surrender to the assessors of the judicial function of itself deciding the issue, however technical it may be. Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear the responsibility, is both copious and old. It is for them to believe or to disbelieve the witnesses, and to find the facts, which they give to their assessors and which must be accepted by them. If they entertain an opinion contrary to the advice given, they are entitled and even bound, though at the risk of seeming presumptuous, to give effect to their own view : *The Alfred* (1) ; *The Swanland* (2) ; *The Magna Charta* (Privy Council) (3) ; *The Aid* (4) ; *The Beryl* (5), per Brett M.R. ; *The Koning Willem II.* (6), per Kennedy L.J. ; *The Gannet* (7), per Lord Halsbury. Such being the position of the judges, what is that of the assessors ? In Admiralty practice they are not only technical advisers ; they are sources of evidence as to facts. In questions of nautical science and skill, relating to the management and movement of ships, a Court, assisted by nautical assessors, obtains its information from them, not from sworn witnesses called by the parties (*The Sir Robert Peel* (8) ; *The Assyrian* (9)), and can direct them to inform themselves by a view or by experiments and to report thereon (24 Vict. c. 10, s. 18, sub-s. 1).

Now, however much Admiralty judges may from time to time seem to have treated the Elder Brethren as members of the tribunal (*The Andalusian* (10) ; *The Marathon* (11) ; *The New Pelton* (12)), however informal these consultations

(1) (1850) 7 Notes of Cases, 352, 354.
(2) (1855) 2 Spinks, 107.
(3) (1871) 1 Asp. M. L. C. 153.
(4) (1881) 6 P. D. 84.
(5) (1884) 9 P. D. 137, 141.
(6) [1908] P. 125, 137.
(7) [1900] A. C. 234, 236.
(8) (1880) 4 Asp. M. L. C. 321.
(9) (1890) 6 Asp. M. L. C. 525.
(10) (1877) 2 P. D. 231, 233.
(11) (1878) 48 L. J. (Ad.) 17.
(12) [1891] P. 258, 261.

may have been (*The Banshee* (1)), the principles above stated have never been in doubt. The precise mode of making use of the assessors provided for it must rest in the discretion of each Court, and, except by statute, as in Scotland (Nautical Assessors Scotland Act, 1894, ss. 3 and 6), written questions and answers cannot be prescribed or required of them, though nothing can be of greater assistance to the appellate tribunal in case of an appeal. What is, however, the function of a Court of Appeal is to urge upon Courts below and to impose upon itself the duty of making up its own mind, alike on questions of nautical skill and on the value of the advice given upon them. I have seen such phrases as these in judgments that have come before us. "I do not find myself in matters of seamanship competent to differ from the assessors below or the assessors in this Court, but the assessors in this Court are provided to advise me on matters of pure seamanship, and I feel it my duty to follow them without expressing an opinion, whether they are right or wrong," or "That being the advice given us by the gentlemen, who are sent by Parliament to advise us, I feel bound to follow it. . . . . I think we are bound . . . . to follow the advice of our assessors, without expressing any opinion of our own," or "without this skilled assistance, I am not at all sure what conclusion I should come to, if I had to decide these matters for myself": *The Artemisia* (2); *The Llanelly*. (3) With great respect they seem to me to be quite contrary to authority. If, as may happen, a judge cannot decide in his own mind whether or not the advice he receives is sound, his position is simply that the point is not proven, and the loss falls on the party, who bears the burden of proof on that issue. It is just as if necessary proof had failed. After all, experience at sea is not everything. Assessors are not chosen for their personal conversance with collisions, and an experienced judge or counsel may boast that he has, in a sense, been in hundreds of collisions while the assessors have hardly seen tens.

(1) (1887) 6 Asp. M. L. C. 130.
(2) Reported, post, p. 164n.
(3) (C. A.) (1925) 23 Ll. L. Rep. 187, 190; (H. L.) (1926) 25 Ll. L. Rep. 37.

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Accordingly, my Lords, I have tried again, and after careful reflection have found my judgment to be eventually in agreement with the advice given to us. The *Nautilus* almost got through, as it was. Her damage, though it proved fatal to her, resulted from engaging an anchor fluke sufficiently to tear a gash in her side under water. The parts of the two vessels first in contact and the angle then made between them are strong to show that, on the other hand, a very small retardation of the downcoming *Nautilus* would have opened a clear eye for her before she arrived. I was much impressed as to this with Mr. Darby's presentation of the facts. Accordingly, the error in not reducing speed cannot be laid aside on the ground that it did not and could not contribute to the collision.

On the other point we are concerned not with any general rule to be laid down now for other circumstances, but solely with the case in hand. No maximum speed is prescribed for the navigation of the River Scheldt. That is left to good judgment in the circumstances of the moment, and I fully appreciate that good judgment directs one to give safety the benefit of the doubt. The advice given to us is not that it was the duty of the *Nautilus* to make the navigation of the Scheldt foolproof for the *Australia*, but that, knowing the *Australia* to be in difficulties at a short distance round the bend, she should not have assumed that they would have been overcome before she herself got so far down, but should have got herself in hand by a reduction of speed, in case those difficulties persisted longer than seemed likely. She would then be able to take effective action of her own to avoid collision, and this at no cost to herself but that of a very brief delay and the temporary annoyance of slackening speed for a ship that was mismanaging her own business. I have, accordingly, come to recognize that the advice given to us was right and to think that the *Nautilus* was to blame as well as the *Australia*.

Accordingly, in my opinion the appeal should be allowed and the judgment of the learned President should be restored.

My Lords, I have been asked to add that my noble and learned friend, Lord Phillimore, concurs in the opinion which I have just read.

LORD CARSON. My Lords, it is essential before dealing with the case of the *Nautilus* to have clearly before one's mind not only the fact that the *Australia* has been held to blame, a conclusion which is not now in controversy, but also the facts and findings upon which that conclusion is based.

The President has found that the *Australia*, according to the rules for the navigation of the Scheldt, was at a place where the navigable channel was only 150 yards wide, out of her proper water, being on her port side, whereas she ought to have been on her starboard side. He has found that this was caused by the decision of her pilot that he could take a course which lay nearer to the north bank than to his starboard hand with a view of approaching the entrance to the docks by the Royers sluice so as to enter the docks by the shortest route. The President further points out, and this appears to me to be a very important matter when we come to consider the action of the *Nautilus*, that the pilot for a considerable time held the view that if necessity arose the *Nautilus* (to whom he ought to have given way under the rules) would give way to him—that she could come under starboard helm and give him a passage on the port side. Now, of course, the *Nautilus* was entirely ignorant of the chances which the pilot of the *Australia* was prepared to take, and in considering the speed at which the *Nautilus* was proceeding, which is the only imputation of negligence suggested against her, one must not leave out of consideration that the officers of the *Nautilus* were entitled to assume until the contrary was apparent that the *Australia* would conform to the regulations and take no chances which were opposed to the rules of proper seamanship. Those being the circumstances of the *Australia* when the *Nautilus* came round the bend it is, I think, clear that all might have gone well were it not for what has been called the "sheer" of the

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Australia—a sheer which, according to the President, canted her head in the first instance to her port side and subsequently brought her under the influence of the ebb tide and so placed her somewhat further on the port side than she otherwise would have been. Personally, I cannot up to this point impute any blame to the *Nautilus* for not anticipating such handling of the *Australia* as I have already indicated, nor do I see on what grounds it can be suggested that under the circumstances the *Nautilus* was proceeding at an undue speed (7½ knots through the water or with the tide 10 knots). More especially is that I think a fair conclusion to come to when we know that up to the time of the sheer referred to, the only signals given were, first, one short blast from the *Australia*, and, second, a similar short blast from the *Nautilus*, indicating that the two vessels intended to pass port to port. It is said, however, that when the sheer occurred and the pilot of the *Australia* had given three short blasts indicating that he was reversing his engines, the *Nautilus* could have avoided the accident by reversing her engines and stopping the ship. My Lords, there is, in my opinion, considerable doubt as to what was the period of time which elapsed from the time when the three blasts were given after the sheer and the time when the collision occurred, and one has only to read the analysis of the evidence upon this point made by the President to see how speculative any conclusion must be when we are dealing with questions of one minute or two and find such discrepancies as exist in the engine-room book and the bridge book. Moreover, we have no clear evidence as to the speed of the *Australia*, and I am not prepared to come to any definite view as being satisfactory to lead to a conclusion that anything the *Nautilus* could have done would have avoided the collision. Nor do I think that the *Australia* being herself to blame has discharged the onus cast upon her of showing that the *Nautilus* had by negligence on her part contributed to the loss or damage. In further support of this conclusion I may add that I was much struck by the references to the evidence very fully presented by Mr. Dumas to show that the pilot of the *Australia* and I think also

the officers of the *Nautilus* both were of opinion up to the last that there really was no risk of any collision. Under the circumstances it appears to me that this appeal fails and that the order of the Court of Appeal should be affirmed.

My Lords, I have not hitherto said anything about the advice given in the various Courts by the nautical assessors in reply to the questions put to them. I do not myself think that there was any question of seamanship involved upon which their opinion could relieve the Courts from the responsibility of drawing their own conclusions. The whole question of negligence depends upon the view which is to be taken and the inferences to be drawn from the facts as they existed at the moment when a decision for action became necessary, and in my view one ought to be very careful to first come to a conclusion upon the existing facts and from them if necessary evolve with minute accuracy the expert questions on which the advice of the nautical assessors is to be obtained.

My Lords, I should like to add that upon the question of the position of the nautical advisers and the ultimate responsibility of the Court for the conclusions arrived at, I am in entire agreement with the views so clearly expressed by my noble and learned friend Lord Sumner.

LORD BLANESBURGH. My Lords, upon the respective rôles of nautical assessor and judge in cases like the present I am in entire agreement with my noble and learned friend Lord Sumner, whose considered judgment I have had the privilege and advantage of reading.

The advice of your Lordships' nautical assessors to which my noble and learned friend has referred was to me also something of a surprise, and if, notwithstanding that advice, I remain, I hope without presumption, upon the merits of this dispute of the opinion in favour of the *Nautilus* that I had formed during the argument, it is because I find in the conduct and signals of the *Australia* on the occasion in question circumstances which preclude her, as I think, from

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pressing against the *Nautilus* the one error which, treating the matter purely as one of seamanship, your Lordships' advisers say she made; and also because on a critical question of fact I have reached a conclusion which, no specific advice tendered by the assessors being thereby disregarded, seems to me decisive in the *Nautilus's* favour.

My Lords, in the view I take of the facts any other decision than one against the *Australia* alone could not, as I feel, be justified, and it is accordingly with real satisfaction that I believe myself free so to decide without departing in any way from principle or encroaching unduly upon the province of the expert.

My Lords, the whole conduct of the *Australia* in relation to this collision stands, in my judgment, condemned by every consideration, whether of duty, prudence or propriety. It was not at the Bar sought to justify or excuse her, but the responsibility, if any, of the *Nautilus* in the matter cannot, I think, be duly appraised unless the behaviour of the *Australia*, both in the abstract and in direct relation to the *Nautilus*, is throughout borne in mind.

There is no justification to be offered for the *Australia* being where she was at the time of the collision. She was an upcoming vessel, in a narrow navigable channel, against a strong tide and near a bight. She was under both a regulated and obvious duty to keep to her own southern side of the channel and to leave the northern half of it free for the passage of any observed vessel coming down with the current. And yet at a time of substantial downgoing traffic, and, as the learned President finds, deliberately and for her own convenience only, she chose to be in the northern half of the channel where eventually the collision with the *Nautilus* took place. It may be that to a negligible extent—although even of that I am sceptical—the *Australia* was there as the consequence of the so-called involuntary sheering which her witnesses exploited to the full. But as the learned President has said, she was in no sense the victim of inevitable accident. In truth and substance she was where she was of her own choice, directing her course to

the red light on the north side of the river at the entrance to the dock which it was her purpose to enter. She was pursuing that course regardless of everything and everybody but herself.

Even so, however, the *Nautilus* is not to be relieved of all responsibility for the collision which supervened if the *Australia* can establish affirmatively that notwithstanding her own negligence the conduct of the *Nautilus* was such as to entitle her on well recognized principles to say that responsibility for the collision must be shared by both vessels. The question whether or not the *Australia* has succeeded in making such a case is, of course, the real issue of this appeal.

In its determination, the behaviour of the *Australia* in direct relation to the *Nautilus* will become of prime importance, and the view taken at the time by those in control of the *Australia* upon the question how far her position in the river affected the passage down stream of the *Nautilus*, throws a light upon much of her conduct and upon all her signals, and may finally determine her liability. What this view was, is not in doubt. It was the convinced, if mistaken, belief of those in control of the *Australia* up to the moment of her sounding her second three short blasts, by which time everything was over, that her position in the river left for the *Nautilus*, as the *Australia's* then position had left for the vessel which preceded the *Nautilus*, a free passage down stream port to port; and the successive helm signals of the *Australia* to the *Nautilus* were intended to be an intimation to her as the oncoming vessel that she might so pass.

That such was the meaning and intent of the one short blast signal is beyond controversy, for, like the learned President, I reject entirely the fantastic suggestion of the *Australia's* pilot, that, notwithstanding that signal, it was, in the circumstances, the duty of the *Nautilus* to pass the *Australia* starboard to starboard and that he believed she would. Only a little less clear is it that there was no intention to qualify the intimation of the one short blast signal by the

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first of the *Australia's* three short blast signals. Followed as that latter signal was by the circumstance, important also in another connection, that the *Australia's* engines were put only half speed and not full speed astern, the signal, I am satisfied in the minds of those who gave it, amounted to no more than an intimation that the passage—not then as they thought too narrow—was being further widened, and that the *Nautilus* might still act on the first signal. It is, indeed, noteworthy, reflecting as it does the state of mind up to the last moment of those in command of the *Australia*, that at no time did she give the four short blast signal—that which by art. 16 of the Scheldt Regulations is authorized and appropriate when intimation is intended to be given that a vessel is not in a condition to manœuvre, and that any vessel approaching will do so at her peril.

Now at this point three facts in relation to the *Nautilus* must be stated. The first relates to her speed. Upon this your Lordships are advised that her speed in itself—that is to say, her speed apart from any duty imposed upon her by the first of the *Australia's* three blast signals—was not excessive for a vessel of her size navigating this part of the Scheldt and coming down the river with the tide. The second fact relates to her navigation. Admittedly that was, in relation to the *Australia* and in every respect other than the disputed exception of speed, free from fault. In particular, the *Nautilus* kept as close as it was safe for her to be to the north bank of the river. The third fact is that the space left for the *Nautilus* by the *Australia* almost sufficed to enable her to pass in safety, port to port. And it seems certain that the space left would have been sufficient, if not ample, for that purpose had the *Australia* for the half minute following her first signal of three short blasts put and kept her engines at full speed astern, as she should have done, instead of at half speed, as she did.

Here then, my Lords, is the position. Concede if you must, that, on the three short blast signal from the *Australia*, if it had not been preceded as it was by a signal of one short blast, it would have been the duty of the *Nautilus*, coming at

10 knots, to slacken speed and even to stop, as your Lordships are advised. Even so, is it permissible in law for the *Australia* to rely upon the omission of the *Nautilus* so to do, when what as between these two vessels happened was that the *Australia*, the giving way vessel, was inviting the *Nautilus* to come on, and that the *Nautilus*, coming on, and at no excessive rate of speed, was only acting as she believed she might act and as the *Australia* intended that she should, and believed that she would. My Lords, it seems to me, on almost elementary principles, that it is not open to the *Australia* in such circumstances as these, to make with respect to the *Nautilus* the complaint as to the speed of her approach, not normally excessive, which in other circumstances would, I am assuming, be competent to her. On that ground, by itself, I am prepared to hold that the *Australia* alone is to blame for this collision. But there is another ground, on which the same conclusion may be based. This, I will state very shortly. The records of the *Australia*, which appear to be the most reliable data extant upon the subject, show that between the first of her three short blast signals and the collision there was an interval of not more than a minute. I do not think that the *Australia* in the circumstances is entitled to ask a Court to hold that the interval was greater. My Lords, on that basis of fact the *Australia* has entirely failed to establish, and the burden is on her, that any engine action by the *Nautilus* would have affected the result, and I notice that the Court of Appeal was advised that it would not. My Lords, for this reason also I am prepared to hold that the *Australia* has failed to relieve herself at the expense of the *Nautilus* of her full responsibility for this collision.

It follows that in my judgment the Court of Appeal was right and that this appeal should be dismissed.

Order of the Court of Appeal reversed, and decree of the President restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House.

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Cause remitted back to the Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, June 11, 1926.

Solicitors for the appellants: *Waltons & Co.*
Solicitors for the respondents: *Parker, Garrett & Co.*

NOTE.

It has been suggested that a succinct account of two recent decisions of this House referred to by Lord Sumner in his judgment—namely, *Owners of S.S. Melanie* v. *Owners of S.S. San Onofre* (*No.* 1) and *Owners of S.S. Artemisia* v. *Owners of S.S. Douglas*—in so far as they deal with the attitude of the Court towards its nautical assessors, may be of use to the profession. This note is accordingly added to the above report.

H. L. (E.). 1919. May 15.

OWNERS OF S.S. MELANIE *v.* OWNERS OF S.S. SAN ONOFRE (No. 1).

This case is noted in the Weekly Notes, but it is thought that a fuller statement of the case, giving the ipsissima verba of the Lord Chancellor on the position of nautical assessors and indicating the issues on which the assessors were consulted, may be found useful.

On the morning of December 27, 1916, a collision occurred in the Bristol Channel near Nash Point between the *Melanie* and the *San Onofre*. There was a dense fog at the time. Both vessels were proceeding up channel against the tide. The engines of the *San Onofre* at the relevant period were working at slow. The *Melanie* drew up and passed the *San Onofre* on the port side. The *Melanie*, apprehending that she was approaching the land too closely, ported her helm, thereby acquiring a southerly heading. She was thus in a position of great danger, as she was moving athwart the natural course of any vessels which might happen to be in the neighbourhood. The captain, becoming alarmed, thought it prudent to come to an anchorage, and accordingly he sounded the signal R on his whistle, which means "The way is off my ship; you may feel your way past me." This signal he sounded three times. In point of fact the way was not completely off the ship. The *San Onofre* shortly afterwards struck the *Melanie* on her starboard side and holed her. In an action brought by the owners of the *Melanie* against the owners of the *San Onofre* Hill J., who was advised by two Elder Brethren of the Trinity House, held that both ships were to blame. He held, first, that the *Melanie* was to blame for sounding the R signals before she had taken her way off. On the question whether the *San Onofre* was also to blame, he found that when the *San Onofre* heard the first R signal she

continued her speed, that when she heard the second R signal she only stopped, and that it was not until she heard the third R signal and saw the *Melanie* too close to permit of the collision being avoided that she reversed. He was advised that this was improper navigation, and he agreed with that advice. In accordance with the advice he had received he held that the *San Onofre* was to blame for not stopping and reversing sooner, and for proceeding too fast in the fog.

The Court of Appeal, acting on the advice of their nautical assessors, which was not the same as that given by the Elder Brethren in the Court below, held that the *Melanie* was alone to blame for the collision. Pickford L.J., having fixed the speed of the *San Onofre* at approximately $3\frac{1}{2}$ knots, said that the question whether, taking all the circumstances of the case into consideration, that was an immoderate speed was not so much a question for them (the Lords Justices) as a question of seamanship. The same remark applied to the question whether it was bad navigation not to stop at the first R signal and not to reverse at the second R signal. Having consulted their nautical assessors on these points and having been advised that the speed was not excessive in the circumstances, and that it was not bad seamanship not to stop or reverse sooner, the Lord Justice said that on a matter of seamanship he was not inclined to dissent from the advice they had received; on the contrary, on the whole, he agreed with it. Warrington L.J. said that, it being a question of seamanship and acting as they did upon the opinion of their nautical assessors, he certainly did not disagree with them, but was rather inclined to agree with them. Scrutton L.J. concurred.

The owners of the *Melanie* appealed.

Butler Aspinall K.C. and *Harold Stranger* for the appellants.
Bateson K.C. and *Dumas* for the respondents.

The House (LORD BIRKENHEAD L.C., VISCOUNT CAVE, LORD BUCKMASTER and LORD PHILLIMORE), after consideration, dismissed the appeal.

LORD BIRKENHEAD L.C. in the course of his judgment said: The case is an extremely difficult one. The issues involved are almost entirely of seamanship, and I have more than once felt great doubt as to the view which ought to be taken. The assessors who advised the learned judge appear to have concurred in his findings. But their Lordships in the Court of Appeal similarly founded themselves upon the judgment of their assessors in a matter which they, too, considered to be one primarily of seamanship. Your Lordships, however, are unfortunately deprived of this foothold, for the two gentlemen who were here for the purpose of affording expert assistance differed from one another upon every point which was in serious controversy. This circumstance in itself illustrates the extremely disputable nature of the events which preceded the collision, and is sufficient to explain the doubts which some of your Lordships from time to time felt in the course of the debate. It becomes necessary, however, to apply our own minds to the facts in order to reach a decision. My Lords, it would, I think, be intolerable if Admiralty appeals were treated as being not from one judge to another but from one assessor to another. The assessors are the expert

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guides of the Court upon such matters of seamanship as are referred to them by the Court. In most cases where assessors sit, the Court will determine the facts in order that where it is necessary the opinion of practical seamen may be made available. In a Court of first instance consultation between the Court and its assessors will naturally and usefully be informal and frequent, and I should be unwilling to suggest artificial restrictions upon its course. But in the Court of Appeal the issues are or ought to be clearly defined, and it would, I think, be convenient that the advice of the assessors should be elicited by written questions. The questions and the answers would thereafter be available for your Lordships. And the answers would obviously be of much greater value if your Lordships were exactly informed of the terms in which the questions had been couched. Indeed, I am by no means satisfied that assessors would be necessary for the purpose of assisting your Lordships if this method of dealing with the matter were adopted in the Court of Appeal.

[His Lordship then stated the facts substantially as above, and after much hesitation came to the conclusion that those on board the *San Onofre* could not reasonably be impeached in any of the respects indicated by the learned judge. He added that Lord Buckmaster concurred in the judgment he had just read.]

The other noble and learned lords, in concurring in the result, did not deal with the point under discussion.

Solicitors for the appellants: *Downing, Middleton & Lewis.*
Solicitors for the respondents: *Thomas Cooper & Co.*

H. L. (E.). 1925. July 24.

OWNERS OF S.S. ARTEMISIA *v.* OWNERS OF S.S. DOUGLAS.

This action arose out of a collision which occurred on August 16, 1923, at about 1.50 A.M. between the *Douglas* and the *Artemisia* in the River Mersey.

The *Douglas*, a small boat of 774 tons, was leaving the Brunswick Dock, which was situated on the Liverpool or east side of the river, with the intention of going down the channel and out to the Isle of Man. A flood tide was running at the rate of 3½ knots an hour, and there was a fresh breeze blowing mainly up the channel. The *Artemisia*, a large vessel of 5751 tons, was waiting to enter the lock out of which the *Douglas* came. She was above the lock, heading down stream, and, assisted by two tugs, was endeavouring to keep her place by stemming the tide, but she was in fact making way against the tide at the rate of 1½ knots per hour. The locks of the Brunswick Dock pointed up river, so that a ship minded to go down river on leaving the dock had to turn through a considerable angle in order to get to the starboard side of the river, which was her proper course. The *Douglas* endeavoured to cross in front of the bows of the *Artemisia*, and the tide and wind drove her up the channel on to the stem of the *Artemisia*, with the result that she was completely destroyed.

Hill J., after taking advice from the Elder Brethren, held that the *Douglas* was alone to blame for the collision.

The Court of Appeal (Bankes, Atkin and Sargant L.JJ.), on the advice of their assessors, held (1.) that the *Artemisia* ought to have stopped and reversed her engines sooner than she did, and (2.) that the master of the *Douglas*, believing that the *Artemisia* was stationary, was not guilty of negligence in crossing ahead of the *Artemisia*, as he would naturally conclude that the *Artemisia* would make room for the vessel coming out of the dock. They therefore held the *Artemisia* alone to blame for the collision. Bankes L.J. said: "Without this skilled advice I am not at all sure what conclusion I should have come to if I had to decide those two matters for myself." Sargant L.J. said: "If the matter had rested only upon the evidence given before the learned judge and on the arguments before us and on his judgment, then I should have been in favour of affirming the judgment of the learned judge. Having regard to the very definite advice with reference to seamanship and good navigation which has been tendered to us by those who advise us, I do not see my way to differ from the judgments of my brethren."

The owners of the *Artemisia* appealed.

Daniel Stephens K.C., *Dumas* and *Holman* for the appellants.
Butler Aspinall K.C., *Langton K.C.* and *A. T. Bucknill* for the respondents.

The House of Lords (LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE), after consideration, reversed the decision of the Court of Appeal and restored the decision of Hill J.

LORD BUCKMASTER, after saying that he saw no reason for challenging the decision of the learned judge that the *Artemisia* was not to blame, and that he equally agreed with him that the real cause of the accident was the attempt of the *Douglas* to cross the bows of the *Artemisia* with a fresh breeze and a strong tide driving her up the channel, concluded his judgment as follows: "The assessors who have assisted the House in this case have given an emphatic negative to the question put to them, which was in the following terms: 'Was it proper seamanship, having regard to wind and tide, for the *Douglas* to take her course across the bows of the *Artemisia*?' And this was my independent conclusion on the facts. It is unfortunate that this advice appears to be the exact opposite of that received from those who assisted the Court of Appeal, and still more unfortunate that this should have again been contrary to the assessors who sat through the trial, for it appears to have been a strong determinant in the decision of the Court of Appeal that the judgment of Hill J. was wrong. Admiralty actions ought not to result in appeals from assessors to assessors, but from judge to judge. I am of opinion that the judgment of Hill J. was right and that the decision of the Court of Appeal should be reversed."

LORD DUNEDIN said, upon this question: "The learned judges of the Court of Appeal candidly say that they have gone on the opinion of the assessors; and I respectfully concur in what your Lordship on the Woolsack has said as to the inexpediency of treating appeals as appeals from assessors to assessors, fortified as that is by what my noble and learned friend Lord Phillimore, whose judgment I have seen, has added from his great experience in these cases. Personally, however, I would go further and say that, in my view, this, as the facts have turned out, is not a case that turns on assessors' opinions at all."

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LORD PHILLIMORE began his judgment as follows: "My Lords, this case presents certain difficulties both in itself and in the way in which it has been handled by the Court of Appeal." And in conclusion he said: "My Lords, before I part with this judgment, I desire to come back to my first paragraph. It is suggested in the case for the appellants that the Court of Appeal allowed this appeal to be treated as an appeal from assessors to assessors, and indeed there is that in the judgments of Bankes L.J. and Sargant L.J. which lends colour to this suggestion; so much so that I think it desirable to repeat and adhere to the words of Lord Birkenhead in the case of *Owners of S.S. Melanie* v. *Owners of San Onofre* [1919] W. N. 151: 'My Lords, it would I think be intolerable if Admiralty appeals were treated as being not from one judge to another, but from one assessor to another. The assessors are the expert guides of the Court upon such matters of seamanship as are referred to them by the Court.' It is no doubt a difficult course for an appellate Court to steer when it seeks the assistance of men of skill who attend to advise it, but does not permit itself to be the instrument for giving effect to the diverging views of professional men, it being almost an accident which of the several pairs assist the Court below and which the Court of Appeal or your Lordships' House. But it is a course which must be carefully and correctly steered. On the whole I agree that this appeal should be allowed in full and the *Douglas* held alone to blame."

LORD SUMNER, in giving judgment to the same effect, did not specifically deal with this question.

LORD ATKINSON concurred.

Solicitors for the appellants: *Holman, Fenwick & Willan.*
Solicitors for the respondents: *Godfrey Warr & Co., for Batesons & Co., Liverpool.*

[PRIVY COUNCIL.]

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AND 1926

CANADIAN NATIONAL RAILWAY COMPANY . . . . . RESPONDENTS. June 21.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railways—Canadian National Railway—Liability for Negligence of constituent Company—Verdict—Damages—Judge capitalizing Annuity awarded by Jury—National Railway Act, 1919 (9 & 10 *Geo.* 5, *c.* 13, *Dom.*), *s.* 15.

Sect. 15 of the National Railway Act, 1919, of Canada, does not render the Canadian National Railway Co. liable in an action for damages due to the negligence of the Intercolonial Railway Co. in September, 1922, since, although the Act came into force on June 6, 1922, the former company was not effectively incorporated until October 4, 1922, and since the Intercolonial Railway did not become one of the constituent railways under the Act until January 20, 1923.

Criticism on the drafting of the above section.

Where a jury has improperly awarded an annuity by way of damages instead of a lump sum the judge should redirect the jury; he has no power to enter judgment for the capitalized amount of the annuity.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 99 of 1925) in forma pauperis, by special leave, from a judgment of the Supreme Court of Canada (May 27, 1925) reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (December 4, 1924), which affirmed on the points material to the present appeal, but reversed on other grounds, the judgment of the Superior Court of the Province.

The appellant, as tuteur, brought an action against the respondent company for damages in respect of the death of a man who had been killed on September 22, 1922, while crossing the track of the Intercolonial Railway, the accident being due, as the plaintiff alleged, to the negligence and illegal conduct of that company or its servants.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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The substantial question on the appeal was whether the action lay against the respondent company under s. 15 of the National Railway Act, 1919 (9 & 10 Geo. 5, c. 13, Dom.). The facts of the case, the material statutory provisions, and the effect of the decisions in Canada appear from the judgment of the Judicial Committee.

1926. April 25, 26. *Pritt* for the appellant.

Lafleur K.C., *Hon. Geoffrey Lawrence K.C.*, and *Darveau K.C.* for the respondents.

June 21. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal in forma pauperis by special leave from a judgment of the Supreme Court of Canada dated May 27, 1925, reversing a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) dated December 4, 1924, which confirmed on the points material to this appeal, but set aside on other grounds, the judgment of the Superior Court of the Province of Quebec (District of Rimouski) given in favour of the appellant on May 17, 1924.

On September 5, 1922, at about two o'clock in the morning, Adelard Fournier and his wife and their young child were driving towards their home; when they came to the point where the roadway crosses the Intercolonial Railway tracks on the level they were struck by a locomotive and tender which were moving reversely. Fournier was instantly killed and his wife was so severely injured that she died a few days afterwards. The child was less severely injured.

The appellant is the tuteur of the six minor children of Adelard Fournier deceased, whose ages varied from three to ten years. The appellant as such tuteur on August 30, 1923, brought against the respondents, the Canadian National Railway Co., the action out of which this appeal has arisen, claiming on behalf of the above-mentioned children to recover damages for the loss they sustained by the death of their father, which, as he alleges, was caused by the negligent and, in the several respects mentioned in the statement of

claim, illegal manner in which the respondents worked and regulated the traffic over the above-mentioned level crossing.

The appellant's statement of claim contained the definite statement that he elected to have his case tried by a jury. The statement was met by a motion to strike out the said paragraph, but the motion was dismissed by Sevigny J., sitting in the Practice Division of the Superior Court of Quebec at Rimouski, and by the Court of King's Bench of Quebec (Appeal Side). The action was ultimately tried before a judge and jury in May, 1924.

The jury found that the Canadian National Railway Co. were by their servants guilty of the negligence charged, but most unfortunately shaped the damages they awarded in a form quite improper and illegal. Instead of finding a verdict for a lump sum, they awarded an annuity of $300 to be paid annually to each of the children of whom the appellant was the tuteur till he or she should reach the age of eighteen years. It is much to be regretted that the learned judge who presided at the trial did not refuse to accept a verdict so shaped, and did not explain to them the proper principle upon which damages should be awarded. That course, however, was not adopted, but instead of it the appellant moved the Court that the annuities awarded should be capitalized at a sum of $15,000, and that a verdict should be found and judgment entered up for that amount with costs. To this course the presiding judge apparently assented. It is in a trial before a judge and jury the function of the jury, not of the judge, to fix the amount of the damages to be awarded. This sum of $15,000 was never awarded by them, and the learned judge had no power to consent to the substitution of the sum of $15,000 for the illegal award of annuities for which the jury had in fact found their verdict.

On June 4, 1924, the respondents appealed from the above mentioned judgment of the Superior Court to the Court of King's Bench of the Province of Quebec, praying that either judgment for them in the aforesaid action might be entered up, or that a new trial might be awarded on the following

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grounds, amongst others: (1.) That the respondents were not in existence at the date of the accident. (2.) That the railway (i.e. the railway on which the accident occurred) was at that time owned and operated by His Majesty, and that the proceedings should have been taken before the Exchequer Court. (3.) That the damages were excessive. (4.) That the judgment did not accord with the verdict, and that the judge had no power to alter the verdict.

The question of the right of the appellant to a trial by jury was not raised by or mentioned in the notice of appeal, having been disposed of by the decision of the Court of King's Bench of February 7, 1924, on the appeal from the Superior Court touching the appellant's right to a trial by a judge and jury. It did not appear to their Lordships that Mr. Pritt, in the very able argument which he addressed to the Board in this case, sought to challenge the grounds number three or four. The question of the right of the appellant to a trial by jury under s. 15 of the statute only arises if their Lordships decide the main question in favour of the appellant.

This main question is not very easy of solution, and the consideration of it necessitates examination of an Order in Council, No. P.C. 115, approved by His Excellency the Governor-General on January 20, 1923, and of several sections of a Dominion statute, the National Railway Act, 1919. The statute came into force on June 6, 1919, and may be conveniently referred to in this judgment as the statute of 1919.

This statute begins with a recital that His Majesty, on behalf of the Dominion of Canada, has acquired control of the Canadian Northern Railway Co. and of the various constituent and subsidiary companies comprising the Canadian Northern system, as specified in the first schedule to the Act annexed, and that it is expedient to provide for the incorporation of a company under which the railways, works and undertakings of the companies comprised in the Canadian Northern system might be consolidated, and together with the Canadian government railways, operated as a national railway system. His Majesty then, with the advice and

consent of the Senate and House of Commons of Canada, assents to this statute of thirty-one sections. It is not necessary to deal with more than three or four of these. By the first of these the Governor in Council is empowered to nominate such persons as may be deemed expedient, not less than five or more than fifteen in number, to be directors of the company thereby incorporated, and upon such nomination being made the persons so nominated and their successors, and such other persons as may from time to time be nominated by the Governor in Council as directors, shall be and are thereby incorporated as a company under the name of the Canadian National Railway Co., thereinafter and hereinafter called the company. Adelard Fournier met his death on September 5, 1922. On October 4, 1922, a month all but one day after that event, an Order in Council, reciting the first section of the statute of 1919, was passed appointing the nine gentlemen therein named directors of the Canadian National Railway Co. Upon that nomination and only then, according to the provision of s. 1 of the statute of 1919, was the Canadian National Railway Co. incorporated and brought into existence. Accordingly, it did not, up to this date, manage, operate or exercise any control whatever over the Intercolonial Railway, upon whose lines Fournier met his death.

By s. 10 of the Act of 1919, the terms Canadian Government Railways, Canadian Northern, Canadian Northern System, and His Majesty are defined, and then by s. 11 it is enacted that "the Governor in Council may from time to time by Order in Council entrust to the Canadian National Railway Co. the management and operation of any lines of railway or part thereof, and any property or works of whatsoever description, or interest therein, and any powers rights or privileges over or with respect to any Railways, properties or work, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty or such part or parts thereof or rights or interest therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions

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as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to termination or variation from time to time in whole or in part by the Governor in Council."

It is obvious that by this section the Governor in Council was empowered to approve of and adopt a rigid and permanent scheme for the management and operation of the railways and parts of railways mentioned in the section, or he might, on the contrary, if it seemed good to him, approve of and adopt a temporary and flexible scheme, susceptible of modification in whole or in part, from time to time as he, the Governor in Council, thought fit, and altogether experimental in character. The Governor-General on January 20, 1923, but not before, purported to exercise the powers by this section conferred upon him by an Order in Council of that date. This Order begins by reciting at length s. 11 of the Act of 1919, and then proceeds to state that the Canadian National Railway Co. was brought into existence by virtue of an Order in Council of October 4, 1922, that the authority of the general manager of the Canadian Government Railways was to be discontinued, and that in lieu thereof the management and operations of these railways was to be entrusted to the company, i.e. the Canadian National Railway Co., pursuant to the provisions of s. 11 above mentioned. The effect of this change is stated to be to make applicable to the management and operation of the said railways many of the provisions of the said statute—namely, to provide for the incorporation of a company under which the railways, works and undertakings of the railways comprised in the Canadian Northern system might be consolidated, and together with Canadian Government Railways operated as a national railway system.

It is then set forth that "The Minister accordingly recommends that the Canadian Government Railways, which for the purpose of s. 10 of the said Act shall include the following lines designated specifically: the Intercolonial Railway, the National Transcontinental Railway, the Lake

Superior Branch leased from the Grand Trunk Pacific Railway Co., the Prince Edward Island Railway, the Hudson Bay Railway; and as a general designation all other railways and branch lines, the title to which and to the lands and properties whereon such railways are constructed are vested in His Majesty, by Order in Council entrusted in respect of the management and operation thereof to the company on the terms in the aforesaid statute expressly specified, namely, that such management and operation shall continue during the pleasure of the Governor in Council, and shall be subject to termination or variation from time to time in whole or in part by the Governor in Council."

It is further set forth that " The Minister also recommends that the full benefit of all powers, rights, privileges and interests vested in His Majesty under any agreement for joint operation or running right with any other corporation in connection with the operation of the said Canadian Government Railways, be also entrusted in respect of such operation and management to the company on the same terms as heretofore set forth."

The provisions of this Order in Council suggest several points for consideration. The Intercolonial Railway, upon the lines of which Fournier met his death, was not included in the Canadian Northern system. The group of railways with which these latter railways should combine are to be operated as a national railway system under the name and title of the National Railway Co. But the Intercolonial Railway was not defined to be a member of the Canadian Government Railways until this Order in Council was passed on January 20, 1923, about four and a half months after the accident had befallen Fournier. And yet it is contended that the railway, i.e. the Canadian National Railway Co., is liable for damages for a tort committed by one of the constituent members of this combined railway before the combination was effected and called into existence, and before the constituent member in default was introduced into the combination. Of course, it was competent for the legislature of Canada to have provided by express and specific legislation

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that this result should follow, but in the absence of such legislation it is not an inference which can be drawn from the general phrases in s. 15, and other sections, of the statute of 1919. Again, there are provisions which strongly support Mr. Lafleur's argument that the formation of this group of railways under the name of the Canadian National Railway was not, and was not intended to be, a fixed permanent arrangement, but was rather a temporary arrangement in the nature of an experiment, its composition varying from time to time if that should be thought desirable. The management of the combined group of railways is to be subject to termination or variation in whole or in part from time to time at the will of the Governor in Council, and some new adventure might be introduced into the group of the company so formed.

The section of the statute upon which the decision of the Board in this case must mainly turn is the fifteenth. It runs thus : " Actions suits or other proceedings by or against the company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the company, without a fiat be brought in, and may be heard by any judge or judges of any Court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in Court under the rules of Court applicable thereto. Any defence available to the respective corporations (including His Majesty) in respect of whose undertaking the cause of action arose shall be available to the company, and any expense incurred in connection with any action taken or judgment rendered against the company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose. Nothing in this Act shall affect any pending litigation."

The section is very badly drafted. It would have been quite easy to have provided that any action, suit or proceeding arising from breaches of contract or tort committed before

the formation of the group, designated the company, by corporations or companies which subsequently became members of the group shall be brought against the company on or after its formation, or vice versa.

The actions, suits or other proceedings mentioned in the opening lines of the section are actions, suits or other proceedings in respect of the undertaking of the company—the Canadian National Railway Co.—or respecting the operation or management of the Canadian Government Railways. As to these latter, it is clear that the cause of action, suit or other proceeding must be something done or omitted to be done by this group during the management and operation mentioned. The same interpretation must be given to the actions and suits arising in respect of the company's undertaking. But the directors of the Canadian National Railway Co. were not appointed or the company incorporated until October 4, 1922; and the Intercolonial Railway Co. was not declared to be one of the Canadian Government railways until January 20, 1923. Therefore, the accident to Fournier on September 4, 1922, cannot be held to be something arising in any way out of the management and operation of a group of railways which until four months after the accident did not include the Intercolonial Co., on which the accident occurred. Nor can an accident which happened a month before a particular undertaking came into existence be held to arise out of the conduct of or in respect of that same undertaking. Whatever might be the right conclusion as to this latter group, there cannot be any doubt as to the management of the Canadian Government Railways, since the Intercolonial line did not belong to them until January, 1923.

The next point is the provision as to the defence available to any of the constituent companies being available to the composite company. It is not easy to give a rational construction to this involved section. It was not apparently contemplated by its authors that where an intended constituent member of a particular group has before its absorption into that group been guilty of a tort or cause of action for which

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it might be sued, that on its absorption into the group two actions can be or are to be brought for the same cause of action one against the constituent member of the group and the other against the group itself, nor does it apparently contemplate that on absorption the group is to be added as a defendant. It apparently deals only with a case in which the group is sued in respect of something done on the system of one of its constituent members after absorption and provides that the group may, if so sued, avail itself of any defence which the constituent member might have availed itself of if it had been sued before absorption.

The next provision as to the recovery of expenses is merely subsidiary to the last. It would appear that the words "pending litigation" must be confined to litigation pending at the passing of the Act. There is nothing of that kind in this case, it is therefore unnecessary to deal with it.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Freshfields, Leese & Munns.*

[PRIVY COUNCIL.]

BISSET . . . . . APPELLANT;

AND

WILKINSON AND ANOTHER . . . . . RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Misrepresentation—Vendor and Purchaser—Rescission of Contract—Statement of Opinion—Carrying Capacity of Sheep Farm.

A representation of fact may be inherent in a statement of opinion; in any case the existence of the opinion in the person expressing it is a question of fact. When it is sought to rescind a contract on the ground of the falseness of a statement of opinion by which it was induced, it must be inquired what was the meaning of the statement made, and whether it was true. Relevant to those inquiries are, the material facts of the transaction, the knowledge of the parties, the words used, and the actual condition of the subject-matter.

In an action by a vendor of land in New Zealand to recover under the contract, the purchaser claimed to rescind the contract on the ground of the falseness of a statement as to the carrying capacity of the land for sheep:—

Held, on the evidence, applying the above considerations, that the statement was merely of an opinion which the vendor honestly held; and accordingly that the defence failed.

Judgment of the Court of Appeal reversed.

APPEAL (No. 42 of 1926) from a judgment of the Court of Appeal of New Zealand (June 6, 1925) reversing a judgment of the Supreme Court (September 5, 1924).

The action out of which the appeal arose was brought by the appellant in the Supreme Court of New Zealand to recover 316*l.*, being half a year's interest on the balance of purchase money due from the respondents under a contract dated May 7, 1919, for the sale and purchase of an estate. The respondents, by their defence and counterclaim, claimed rescission of the contract, or alternatively, damages for fraudulent misrepresentation.

The facts are fully stated in the judgment of the Judicial Committee.

* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, LORD CARSON, and LORD MERRIVALE.

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The trial judge (Sim J.) gave judgment for the plaintiff. On appeal the Court of Appeal (Stout C.J., Adams and Ostler JJ.; Reed J. dissenting) reversed the decision. Judgment was given for the respondents on the claim and counterclaim, the contract being rescinded, and the case remitted for inquiries.

1926. June 14, 15, 17. *Myers K.C.* and *Errington* for the appellant.

Gresson and *F. O. Langley* for the respondents.

July 20. The judgment of their Lordships was delivered by

LORD MERRIVALE. The appellant in this litigation brought his action in the Supreme Court of New Zealand to recover a sum of money payable to him under an agreement for sale and purchase of land. The defendants by way of defence and counterclaim alleged misrepresentation by the appellant in a material particular as to the character and quality of the land in question and claimed rescission of the agreement with consequential relief or alternatively damages for fraudulent misrepresentation or breach of warranty. Upon the trial of the action judgment was given for the plaintiff on the claim and the counterclaim. The Court of Appeal of New Zealand, by a majority, set aside the judgment of the trial judge and decreed rescission of the contract between the parties with consequential relief as prayed. The appellant claims to have the judgment of the Supreme Court reinstated.

The contract between the parties was an agreement in writing made in May, 1919, whereby the respondents agreed for the purchase by them of two adjoining blocks of land at Avondale, in the Southern Island of New Zealand, called "Homestead" and "Hogan's," containing respectively 2062 acres and 348 acres or thereabouts, for 13,260*l.* 10*s.*; 2000*l.* payable—and it was in fact paid—on the signing of the agreement, and the balance payable in May, 1924, interest to be paid half-yearly in the meantime. The lands in question formed parts of an area of 5225 acres which the appellant had bought in 1907 and after sundry works of reclamation

and improvement had in 1911 sub-divided for sale. He sold lots containing 1500 acres and upwards, 964 acres, 350 acres, and Hogan's block of about 348 acres, retaining the Homestead block of 2400 acres which he used for his business of a sheep-farmer and sheep dealer until 1919—during the war under some difficulties with regard to labour. Hogan's block was thrown on the appellant's hands by failure of the purchaser to complete, and in September, 1918, on the breakdown of a provisional arrangement which the appellant had made with another intending purchaser, he resumed his occupation of it. During the spring and summer, September, 1918, to April, 1919, the appellant carried out renewal work and stocked part of Hogan's block with young sheep, and in May he made his agreement for sale of the combined areas to the respondents, who had agreed upon a partnership as farmers.

Sheep-farming was the purpose for which the respondents purchased the lands of the plaintiff. One of them had no experience of farming. The other had been before the war in charge of sheep on an extensive sheep-farm carried on by his father, who had accompanied and advised him in his negotiation with the appellant and had carefully inspected the lands at Avondale. In the course of coming to his agreement with the respondents the appellant made statements as to the property which, in their defence and counter-claim, the respondents alleged to be misrepresentations.

At an early period after the respondents went into occupation and commenced their farming operations they found themselves in difficulties. They sought and obtained extensions of time for payment of the interest which fell due to the appellant. Sheep-farming became very unprofitable and they changed their user of the land. One of them withdrew from the partnership. The other made an assignment of the valuable part of his property to his wife, and on being eventually pressed by the appellant for payments under the agreement disclosed this assignment as an answer to the practical enforcement by the appellant of his demands. The appellant brought his action for a half-year's interest

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on the unpaid purchase money and the respondents set up their case of misrepresentation.

By their defence and counterclaim the respondents alleged that the appellant had "represented and warranted that the land which was the subject of the agreement had a carrying capacity of two thousand sheep if only one team were employed in the agricultural work of the said land." It was common ground at the hearing and in the Court of Appeal that the carrying capacity of a sheep-farm is its capacity the year round. As was said by Reed J. in the Court of Appeal: "The meaning of the representation as alleged was that the carrying capacity of the farm during the winter, with such special food and new pasture as could be grown by the proper use in ploughing of one team of horses regularly employed throughout the year was two thousand sheep." "It is also common ground," said the same learned judge, "that to bring a farm to its full carrying capacity skilled management is required. It is admitted that the appellants were not experienced farmers."

The appellant made these admissions at the hearing: "I told them that if the place was worked as I was working it, with a good six-horse team, my idea was that it would carry two thousand sheep. That was my idea and still is my idea." Further, he said: "I do not dispute that they bought it believing it would carry the two thousand sheep."

The learned judge who tried the action, Sim J., based his judgment in favour of the appellant upon conclusions at which he arrived upon his examination of the evidence, first, that the representation made by the plaintiff was a representation only of his opinion of the capacity of the farm, not a representation of what that capacity in fact was; and secondly, that this representation of opinion was honestly made by the appellant. "It seems to me," the learned judge said, "that the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject. I am satisfied that what he said was, and still is, his honest opinion on the subject." These conclusions—

if warranted by the evidence—were sufficient to dispose of the whole case of misrepresentation, whether as grounding a claim for rescission or a claim for damages. By them the charge of fraud in the pleadings is also specifically negatived. The cause of action founded on alleged warranty which is set up in the defence and counterclaim was, it has been agreed, not asserted at the trial, and the fact is not without bearing on the true effect of the claims which were relied upon.

In the Court of Appeal, as is said in the judgment of Stout C.J., "the real question in dispute turned out to be whether the appellants were entitled to rescission of the contract. They did not rely upon the breach of warranty, but they asked for rescission of the contract, though their claim for damages for misrepresentation had not been formally withdrawn." The learned judges of the Court of Appeal differed in opinion. Reed J.—who thought the appeal failed —dealt with the case upon the contention of the defendants —the now respondents—that the representation made to them by the plaintiff was a representation of fact. He found it to be conclusively established by the defendants' own evidence that, given proper management, the farm was fully capable of carrying at least two thousand sheep. Stout C.J. held that the statement relied upon was made and accepted as a statement of fact. "It would surely be improbable," the learned Chief Justice said, "that when a seller is asked to say what the carrying capacity of his farm is he should not answer the question, but volunteer his opinion or estimate." As to the truth of the representation, the learned Chief Justice said: "The evidence in my opinion is clear that this place never carried all the year round two thousand sheep." He added this: "The respondent allowed the appellants to purchase the farm from him believing that it would carry two thousand sheep, and, therefore, they were misled." Adams and Ostler JJ. alike held that the statement was a representation of fact and was proved to be untrue.

In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation

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is the alleged ground of relief of the party who repudiates the contract, it is, of course, essential to ascertain whether that which is relied upon is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy, as is illustrated in a good many reported cases, as well as in this. A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact. In *Karberg's Case* (1) Lindley L.J., in course of testing a representation which might have been, as it was said to be by interested parties, one of opinion or belief, used this inquiry : " Was the statement of expectation a statement of things not really expected ? " The Court of Appeal applied this test and rescinded the contract which was in question. In *Smith* v. *Land and House Property Corporation* (2) there came in question a vendor's description of the tenant of the property sold as " a most desirable tenant "—a statement of his opinion, as was argued on his behalf in an action to enforce the contract of sale. This description was held by the Court of Appeal to be a misrepresentation of fact, which, without proof of fraud, disentitled the vendor to specific performance of the contract of purchase. " It is often fallaciously assumed," said Bowen L.J., " that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his

(1) [1892] 3 Ch. 1, 11. (2) (1884) 28 Ch. D. 7, 15.

opinion." The kind of distinction which is in question is illustrated again in a well known case of *Smith* v. *Chadwick*. (1) There the words under consideration involved the inquiry in relation to the sale of an industrial concern whether a statement of "the present value of the turnover or output" was of necessity a statement of fact that the produce of the works was of the amount mentioned, or might be and was a statement that the productive power of the works was estimated at so much. The words were held to be capable of the second of these meanings. The decisive inquiries came to be: what meaning was actually conveyed to the party complaining; was he deceived, and, as the action was based on a charge of fraud, was the statement in question made fraudulently?

In the present case, as in those cited, the material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject-matter spoken of, are relevant to the two inquiries necessary to be made: What was the meaning of the representation? Was it true?

In ascertaining what meaning was conveyed to the minds of the now respondents by the appellant's statement as to the two thousand sheep, the most material fact to be remembered is that, as both parties were aware, the appellant had not and, so far as appears, no other person had at any time carried on sheep-farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. The two blocks comprised in it differed substantially in character. Hogan's block was described by one of the respondents' witnesses as "better land." "It might carry," he said, "one sheep or perhaps two or even three sheep to the acre." He estimated the carrying capacity of the land generally as little more than half a sheep to the acre. And Hogan's land had been allowed to deteriorate during several years before the respondents purchased. As was said by Sim J.: "In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its

(1) (1884) 9 App. Cas. 187; (1882) 20 Ch. D. 27.

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carrying capacity would be regarded as a statement of fact. . . . . This, however, is not such a case. The defendants knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. In these circumstances . . . . the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject." In this view of the matter their Lordships concur.

Whether the appellant honestly and in fact held the opinion which he stated remained to be considered. This involved examination of the history and condition of the property. If a reasonable man with the appellant's knowledge could not have come to the conclusion he stated, the description of that conclusion as an opinion would not necessarily protect him against rescission for misrepresentation. But what was actually the capacity in competent hands of the land the respondents purchased had never been, and never was, practically ascertained. The respondents, after two years' trial of sheep-farming, under difficulties caused in part by their inexperience, found themselves confronted by a fall in the values of sheep and wool which would have left them losers if they could have carried three thousand sheep. As is said in the judgment of Ostler J.: "Owing to sheep becoming practically valueless, they reduced their flock and went in for cropping and dairy-farming in order to make a living."

The opinions of experts and of their neighbours, on which the respondents relied, were met by the appellant with evidence of experts admitted to be equally competent and upright with those of his opponents, and his own practical experience upon part of the land, as to which his testimony was unhesitatingly accepted by the judge of first instance. It is of dominant importance that Sim J. negatived the respondents' charge of fraud.

After attending to the close and very careful examination of the evidence which was made by learned counsel for each of the parties their Lordships entirely concur in the view

which was expressed by the learned judge who heard the case. The defendants failed to prove that the farm if properly managed was not capable of carrying two thousand sheep.

Questions of laches and of affirmance of the contract on the part of the respondents which were argued at the hearing, are not material for further consideration, and in view of the course of the proceedings and the finding of Sim J. as to the honesty of the appellant in the statements he in fact made, it would be improper to accede to the application which was made at the Board on behalf of the respondents for leave to proceed anew upon the charge of fraudulent misrepresentation.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Sim J. restored. The respondents must bear the appellant's costs here and below.

Solicitors for appellant: *Collyer-Bristow & Co.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS . . . . . } APPELLANTS;

AND

McLEAN GOLD MINES, LIMITED . . RESPONDENTS.

J. C.* 1926 *July* 22.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Crown—Action impugning Title of Crown—Absence of Petition of Right—Forfeiture and Regrant of Mining Claims—Mining Tax Act (R. S. Ont., 1914, *c.* 26), *s.* 21—*Petitions of Right Act*, 1864 (23 *&* 24 *Vict. c.* 34), *s.* 5.

Two mining claims in Ontario granted by the Crown were forfeited, under the Mining Tax Act, for default in the payment of taxes, and were granted to another person. Assignees of the original grantee

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* *Present:* VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD ATKINSON, LORD JUSTICE WARRINGTON, and CHIEF JUSTICE ANGLIN.

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brought an action against the Attorney-General, the Minister of Mines, and registered owners under the new grant, alleging defects in the forfeiture proceedings, and claiming a declaration that they were the true owners, a declaration that the forfeiture certificates were void, and an order that they should be substituted as owners in the register of titles :—

Held, that as the plaintiffs' claim impugned the title accruing to the Crown on the forfeiture, it could not be made by action, but only by petition of right ; notice of the petition could be given (under an Ontario rule of practice corresponding to s. 5 of the Petitions of Right Act, 1864) to the persons in possession.

Esquimalt and Nanaimo Ry. Co. v. *Wilson* [1920] A. C. 358 ; *Dyson* v. *Attorney-General* [1911] 1 K. B. 410 ; *Farah* v. *Glen Lake Mining Co.* (1908) 17 Ont. L. R. 1 ; and *Zock* v. *Clayton* (1913) 28 Ont. L. R. 447 distinguished.

Judgment of the Appellate Division reversed.

APPEAL (No. 38 of 1926) from a judgment of the Supreme Court of Ontario, Appellate Division (November 10, 1925), reversing a judgment of Lennox J.

The action arose out of the forfeiture, under the Mining Tax Act (R. S. Ont., 1914, c. 28), of certain mining claims granted by the Crown, and their regrant. The respondents, assignees of the original grantee, brought the present action in the Supreme Court against the appellants—namely, the Attorney-General for Ontario, the Minister of Mines for Ontario, and the Porcupine Paymaster Mines, Ld., who by transfer from the new grantee were registered owners under the Land Titles Act. The plaintiffs claimed by their writ (inter alia) to set aside the forfeiture for alleged irregularities in the procedure, and to have their names substituted on the register as owners.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Lennox J.) dismissed the action, holding the plaintiffs could proceed only by petition of right. The Appellate Division (Latchford C.J. and Middleton, Orde and Smith JJ.A.) reversed the decision. The judgment was delivered by Middleton J.A., and took the view that the action was merely one for the possession of land in which the Crown was interested, and could be maintained. It was held that the requirements of the Mining Tax Act had

not been complied with. The Court made an order declaring the certificates of forfeiture and the regrants to be void, and directed that the plaintiffs should have possession and damages for trespass. The proceedings on appeal are reported at 58 Ont. L. R. 64.

1926. June 29 ; July 1. *Nesbitt K.C.* and *C. C. Robinson K.C.* for the appellant Attorney-General.

Sir John Simon K.C. and *W. R. Smyth K.C.* for the appellant company.

Tilley K.C. and *T. A. Beament* for the respondents.

July 22. The judgment of their Lordships was delivered by

ANGLIN C.J. At the threshold of this case lies the important question whether the claim asserted by the plaintiffs (respondents) in this action should not rather have been made the subject of a petition of right.

The facts material to the determination of this question are as follows :—

In the year 1914 the Crown, in right of the Province of Ontario, granted Mining Claims L.O. 321 and L.O. 322 to one Haldane Miller. In 1917 Miller transferred these claims to the plaintiffs, who became the registered owners thereof, with an absolute title under the Land Titles Act (R. S. Ont., 1914, c. 126) as parcels Nos. 184 and 185. For alleged default in payment of taxes for several years, proceedings were instituted in 1919–20 by the Department of Mines under s. 21 of the Mining Tax Act (R. S. Ont., 1914, c. 26) for the forfeiture to the Crown of these mining claims. The proceedings culminated in the issue, on October 7, 1920, of two certificates under the hand and seal of office of the Minister of Mines, one of which declared Mining Location L.O. 321, and the other Mining Location L.O. 322, forfeited to and vested in the Crown in right of the Province of Ontario, and that the patents or leases thereof were revoked and cancelled. These certificates were duly recorded in the Land Titles Office, as provided by sub-s. 5 of s. 21 of the Mining Tax Act, and parcels Nos. 184 and 185 were thereupon declared

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"closed" in the Land Titles Register. The result of the foregoing steps, if validly taken, was that the lands known as Mining Claims L.O. 321 and L.O. 322 were revested in the Crown, and the title to them stood as it had before their staking and location by, and the grant of them to, Haldane Miller.

The two mining claims (L.O. 321 and L.O. 322) having been declared "open for staking and recording" by Order in Council passed on October 13, 1920, under the authority of sub-s. 4 of s. 21 of the Mining Tax Act, appear to have been subsequently taken up by one Fuller, who, on May 27, 1921, obtained Crown grants thereof to himself, which he caused to be duly registered in the Land Titles Office in June, 1921, and he was thereupon given certificates of absolute ownership of the claims thereafter known as parcels Nos. 542 and 543 respectively. Fuller, in August, 1921, transferred his title to the defendants (appellants), the Porcupine Paymaster Mines, Ld., which took possession of both claims and has since expended large sums of money in development work upon them.

Having made a tender of the arrears of taxes on September 27, 1922, which was refused, the plaintiffs, on November 1, applied to the Mining Commissioner for relief. That officer upheld the defendant company's title; and on appeal the Appellate Division held the Mining Commissioner incompetent to entertain the proceedings and set them aside. Thereupon alleging that, owing to defects in the proceedings taken therefor, the alleged forfeiture of its rights was null and void, the plaintiff company brought this action against the Attorney-General for Ontario, the Minister of Mines for Ontario, and the Porcupine Paymaster Mines, Ld., claiming (inter alia) a declaration that they (the plaintiffs) are the true owners of the lands known as mining claims L.O. 321 and L.O. 322; a declaration that the two certificates of forfeiture of those lands were and are void, and an order that they be struck off the register in the land titles office; a declaration that such mining lands were not open for location and staking by Fuller, and that the patents issued therefor

to Fuller and his transfers to the defendant company were and are void; and an order directing the local master of titles to make all necessary corrections in the register so that the plaintiffs will appear as registered owners in fee simple of the lands in question; incidentally an injunction, damages and an accounting are also sought.

Taking the view that the plaintiffs' remedy, if any, was by petition of right, and holding moreover that they had failed to establish any defect in the proceedings for forfeiture fatal to their validity, the learned trial judge dismissed the action. His judgment was reversed by the second Appellate Divisional Court, which held that, as the recovery of the possession of the lands was sought from the defendant company which was in actual possession of them, the remedy by action was open to the plaintiffs, and also that there were defects and irregularities in the proceedings for forfeiture which were fatal to the validity of the Minister's certificates in which they had culminated. That Court accordingly allowed the plaintiffs' appeal, and granted them the relief prayed for in their statement of claim, including a declaration that the proceedings for forfeiture of mining claims L.O. 321 and L.O. 322 were null and void, and an order directing the master of titles to expunge from the register the two certificates of forfeiture issued by the Minister of Mines and recorded in the Land Titles Office. From this judgment appeal has been taken to the King in Council.

It is obvious that it is vital to the success of the plaintiffs that they should obtain the particular declaration and order last set forth. Had the judgment merely set aside the Crown grants to Fuller and his transfers to the defendant company and vacated the registration of these several instruments, the result would have been to leave the title to the mining claims vested in the Crown. Indeed, it is essential to the plaintiffs' status to seek relief against the defendant company that they should re-establish their interest in the lands by avoiding the forfeiture of that interest under the provisions of the Mining Tax Act. Until that has been done the plaintiffs cannot be regarded as having any interest which

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would enable them to impeach the title of the defendant company.

However the plaintiffs' claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture. The real matter in issue is the Crown's title and its consequent right to grant the two mining claims in question to the defendant company's predecessor in title. If that were determined in the plaintiffs' favour, the relief sought against the defendant company (subject perhaps to some question as to the effect under s. 42 of the Land Titles Act of the transfers by Fuller, who was registered as owner with an absolute title) might follow as a consequence. Indeed, the chief, if not the sole, ground of the attack on the grants under which the defendant company claims is the absence of title in the grantor—the Crown.

When this aspect of the matter is appreciated the present case seems to their Lordships to fall within the very terms of the Ontario rule of practice, No. 741: "Where the petition" (i.e., the petition of right) "is presented for the recovery of real or personal property, or any right in or to the same, which has been granted or disposed of by or on behalf of His Majesty or his predecessors, a copy of the petition and fiat shall be served upon or left at the last or usual or last known place of abode of the person in the possession, occupation or enjoyment of the property or right, indorsed with a notice according to form No. 126." This rule corresponds to s. 5 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34 (Imperial)), a procedure which was made use of in the case of *In re Gosman* (1), as noted in Robertson's "Civil Proceedings By and Against the Crown," at p. 372. The plaintiffs' claim is for the recovery of property "which has been granted or disposed of by or on behalf of His Majesty," and it rests on the assertion that His Majesty could not effectively grant or dispose of that property because he lacked title thereto, owing to the invalidity of the forfeiture proceedings on which that title depended.

(1) (1880) 15 Ch. D. 67; (1881) 17 Ch. D. 771.

Such a case differs widely from that with which this Board was called upon to deal in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1), relied upon by the respondents. There, as Lord Buckmaster observed, "the title of the Crown to the land (was) not in controversy." The reason for allowing the Attorney-General to be added as a defendant to the Esquimalt Railway Co.'s actions was that if the Crown grants there attacked were set aside and the lands covered by them revested in the plaintiffs, the Crown would, as an incidental result, lose the benefit of certain reservations in its favour made in the impugned grants to the defendants which had not been made in the earlier grant to the plaintiffs. Only in that way were the interests of the Crown involved.

A similar consequence would ensue in the present case were the plaintiffs granted the relief they seek, the reservations in the grants to Fuller covering some matters not excepted from the earlier grants to Miller. But there the similarity between the two cases ceases. In the present case the setting aside of the grant to the defendant company's predecessor in title (Fuller) would not revest the title in the plaintiffs, as would have happened upon the grants to the defendants being set aside in the *Esquimalt* case. (2) In the case now before their Lordships the plaintiffs, in order to recover the lands they seek, must first set aside the forfeiture proceedings which, if valid, extinguished their ownership of them and vested the title to those lands in the Crown.

This feature of the present litigation serves to distinguish it from *Dyson* v. *Attorney-General* (3), and also from two cases in the Ontario Courts cited for the respondents: *Farah* v. *Glen Lake Mining Co.* (4) and *Zock* v. *Clayton.* (5) In each of these two Ontario cases the only relief sought in regard to the lands in question (in the former by counterclaim; in the latter by action) was the setting aside of a Crown grant or patent of them which stood in the claimant's way, and the jurisdiction invoked was a statutory power (4 & 5 Vict.

(1) [1920] A. C. 358, 363.
(2) [1920] A. C. 358.
(3) [1911] 1 K. B. 410, 414, 421, 422.
(4) 17 Ont. L. R. 1.
(5) 28 Ont. L. R. 447.

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c. 100, s. 29) formerly exercised by the Ontario Court of Chancery, to set aside Crown patents for lands "issued through fraud or in error or improvidence." A principal point for decision was whether this statutory power was vested in the Supreme Court of Ontario under the Judicature Act. The case before their Lordships does not fall within that statutory power; neither fraud upon, nor error or improvidence of the representatives of the Crown in making the grants to Fuller is alleged; want of title in the Crown because of invalidity in its proceedings for forfeiture is put forward as the ground of relief. As said by Moss C.J.O. in *Farah's* case (1), already referred to: "Cases involving questions in relation to grants by the Crown of a different character were left to the operation of the common law or were specially provided for by legislation."

Confronted with this difficulty, counsel for the respondents invoked the Land Titles Act, ss. 115 and 116, as enabling them to maintain this action for the rectification of the Land Titles register. Those provisions appear to their Lordships to be intended to confer on the Court jurisdiction to direct the correction of the Land Titles register where, in proceedings otherwise competent, rights have been established to which effect can thus be given. They confer power to direct consequential relief, but they do not purport to create a right to proceed by action to establish claims which would otherwise be enforceable only by petition of right. Moreover, these sections of the Land Titles Act cannot be taken as intended to deprive the Crown, which is not mentioned in them, of its prerogative to decline to be impleaded in the Courts for the recovery of property otherwise than by a petition for the hearing and disposition of which it has accorded its fiat "that right be done": Mitford on Pleading, p. 30. The elementary rule of construction embodied in s. 11 of the Interpretation Act (R. S. Ont., 1914, c. 1) that: "No Act shall affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby," applies. The plaintiffs

(1) 17 Ont. L. R. 1, 17.

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cannot invoke ss. 115 and 116 of the Land Titles Act to dispense them from the necessity of presenting the claim which they assert in this action by petition of right bearing the fiat of the Lieutenant-Governor.

The view which their Lordships take of this aspect of the case before them renders it unnecessary that they should consider the merits of the objections made by the plaintiffs to the validity of the proceedings which led up to the granting of the Minister's certificates declaring forfeiture of its interest in the two mining claims to the Crown.

In the result their Lordships think that this appeal must succeed, and they will humbly advise His Majesty that the judgment of Lennox J. dismissing this action should be restored, and that the costs of the appellants here and in the Appellate Division of the Supreme Court of Ontario should be paid by the respondents.

Solicitors for appellants: *Freshfields, Leese & Munns.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1926 *July* 27.

MINISTER OF FINANCE . . . . . APPELLANT;

AND

SMITH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Taxation—Income Tax—"Income"—Profit from illicit Traffic in Liquor—Income War Tax Act, 1917 (7 & 8 *Geo.* 5, *c.* 28, *Can.*), *s.* 3, *sub-s.* 1.

Profit arising within Ontario from illicit traffic in liquor there carried on contrary to legislative provisions of the Province is "income" as defined by s. 3, sub-s. 1, of the (Dominion) Income War Tax Act, 1917, and is liable to taxation under that Act.

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* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD DARLING, and LORD JUSTICE WARRINGTON.

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Observations of Scrutton L.J. in *Inland Revenue Commissioners* v. *Von Glehn* [1920] 2 K. B. 553, 572, 573 commented on.
Judgment of the Supreme Court of Canada [1925] S. C. R. 405 reversed.

APPEAL (No. 119 of 1925) from a judgment of the Supreme Court of Canada (May 5, 1925) reversing a judgment of the Exchequer Court (June 2, 1924).

A case stated for the opinion of the Exchequer Court of Canada raised the following question: "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said Provincial legislature in that respect, 'income' as defined by s. 3, sub-s. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied, and paid thereon the taxes provided in the said Act?"

The Exchequer Court held that the profits in question were "income" and liable to the tax. That decision was reversed by the Supreme Court of Canada by judgments reported at [1925] S. C. R. 405.

1926. June 5. *Clauson K.C.* and *C. F. Elliott* for the appellant.

Pritt for the respondent.

[Reference was made to *Caron* v. *The King* (1); *Cooper* v. *Stubbs* (2); *Partridge* v. *Mallandaine* (3); and to observations of Scrutton L.J. in *Inland Revenue Commissioners* v. *Von Glehn*. (4)]

July 22. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada which reversed the judgment of the Exchequer Court. The decision of the Exchequer Court, which was that of Audette J., was in answer to a question arising on a special case stated by direction of the Court itself, on an appeal by the respondent under the provisions of the Income War Tax Act, 1917, of the Dominion, as amended by subsequent legislation. This

(1) [1924] A. C. 999, 1006.
(2) [1925] 2 K. B. 753, 769.
(3) (1886) 18 Q. B. D. 276.
(4) [1920] 2 K. B. 553, 572, 573.

question was raised upon the narrative that the respondent Smith had, during the year 1920, gained certain profits within the Province of Ontario by operations in illicit traffic in liquor contrary to the existing Provincial legislation in that respect. Upon these profits Smith had been assessed for income tax, pursuant to the Income War Tax Act, 1917, and the amendments thereto. The validity of the assessment, in so far as it included the said profits as a basis for computing the tax as assessed, was in dispute. The question for the opinion of the Court was "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing Provincial legislation in that respect 'income' as defined by s. 3, sub-s. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act." On this question the Exchequer Court decided that the profit arising from the illicit traffic within Ontario was "income" taxable under the Dominion statutes referred to, and dismissed an appeal brought to it by the respondent Smith.

The power of the Dominion Parliament to tax income is exercised under head 3 of s. 91 of the British North America Act, 1867. This extends to the raising of money by any mode or system of taxation. The Dominion Parliament is in such a matter of taxation quasi sovereign, and it is not open to serious doubt that under s. 91 the Dominion Parliament could tax the profits in question if it thought fit to do so, or that the fact that they arose from operations of traffic in liquor made illicit by the Provincial legislation of a Province constitute no hindrance to such taxation, if the Dominion Parliament had clearly directed it to be imposed. The only real question is one of construction, whether words have been used which impose a tax in such a case.

Sect. 3 of the Income War Tax Act, 1917, defines income as including the annual net profit or gain or gratuity being profit from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any trade, manufacture or business as the case may be,

J. C. 1926 MINISTER OF FINANCE v. SMITH.

whether derived from sources within Canada or elsewhere, and as including the indirect profits or dividends directly or indirectly received from money at interest upon any security or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the profit or gain from any other source. Sect. 4 imposes income tax upon the income so defined of any person carrying on business in Canada. The respondent was engaged during the year 1920 in illicit traffic in liquors in Ontario, contrary to the provisions of the Ontario Temperance Act and the amendments thereto, and the question is whether the Parliament of Canada has enacted that he is to be taxed on the profits from this.

In the Exchequer Court, Audette J. said that trading in liquor is not illicit or illegal at common law, and not malum in se but only malum prohibitum, and is not a criminal offence. It was, however, illicit and illegal by the laws of Ontario, and the present respondent could not invoke his own turpitude to claim immunity from paying taxes, and ask for discrimination in his favour, increasing the amount which might have to be levied on honest traders. It was not necessary to inquire, he added, into the source from which his revenue was derived, for the tax was by s. 4 of the Taxing Act imposed on the person. The illicit traffic in question was not a criminal offence in itself, and while illegal in Ontario, might not be so in other parts of Canada. The Provincial legislation could not derogate from the right of the Dominion under its Taxing Act, and the profits in question came within the ambit of the definition of income in that Act.

The Supreme Court took a different view. The learned judges of that Court thought that such a business as that of the present respondent ought to be strictly suppressed, and that it would be strange if under the general terms of the Dominion statute the Crown could levy a tax on the proceeds of a business which a Provincial legislature, in the exercise of its constitutional powers, had prohibited within the Province. They held that the power, given to the Dominion Minister, by s. 7, to call for a return of the taxpayer's income

vouched by documents and in detail, and for records which he was to keep, could be construed only as relating to what was legal, and could not extend to gains from crimes. They therefore allowed the appeal. Idington J. added that the "bootleggers," as the profiteers under the Ontario Temperance Act had been called, were well known before the Taxing Act became operative, and that it was to be expected that if it had been intended to apply that Act to them express or very clear language would have been used. The judgment of the Exchequer Court was accordingly reversed, and this appeal is the result.

Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

There are certain expressions at the end of the judgment of Scrutton L.J. in *Inland Revenue Commissioners* v. *Von Glehn* (1) as to the scope of the British Income Tax Acts.

(1) [1920] 2 K. B. 553, 572, 573.

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Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. The question is never more than one of the words used.

They will humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside with costs and the judgment of the Exchequer Court restored. The respondent will pay the costs of the appeal.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1926 *July* 30.

BOLAND . . . . . APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Railways—Expropriation of Land—Signature of deposited Plan—National Railway Company—Order of Railway Board—Scope of Detail Plans—Expropriation Act (*R. S., Can.*, 1906, *c.* 143), *ss.* 3, 11—*Railway Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 68, *Dom.*), *s.* 257—*National Railway Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 13, *Dom.*), *s.* 13, *sub-ss.* 1, 2.

An order made by the Railway Board of Canada under s. 257 of the Railway Act directed the respondent company, incorporated pursuant to the National Railway Act, 1919, to construct a subway so that an existing road should pass under their railway track instead of crossing it on the level. The order directed that a plan showing the subway should be deposited within thirty days, and "detail plans" at an

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* *Present:* VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD JUSTICE WARRINGTON.

unspecified time. A plan, which did not show that any work except the subway itself was intended, was deposited and approved. Later, the company desired to acquire a strip of land belonging to the appellant, in order to construct a roadway giving to premises adjoining the road access to the subway. They deposited a further plan, signed by the vice-president of the company, showing the intended roadway, and took possession of the strip of land. The appellant sued for an injunction :—

Held (1.) that the effect of s. 13, sub-ss. 1, 2, of the National Railway Act, 1919, was to place the vice-president in the position of a minister, for the purpose of taking land under the Expropriation Act, only if the land was required for the undertaking of the railway, which was not here the case. The land clearly was not required for the railway itself, and the subway was not part of the railway undertaking—the road when lowered would remain vested in the municipality.

(2.) That, whether the Railway Board had or had not power under the Railway Act to direct the giving of access involving the taking of land, the order of the Board could not be read as so directing; the further plan was not a "detail plan" within the order, since it went beyond the scope of the original plan deposited and approved.

(3.) That, for the above reasons, the appellant's land had not been validly taken under either the Expropriation Act or the Railway Act, and that accordingly she was entitled to an injunction.

Judgment of the Appellate Division reversed.

APPEAL (No. 51 of 1926) from a judgment of the Supreme Court of Ontario, Appellate Division (October 2, 1925), affirming a judgment of Orde J.

The appellant brought an action in the Supreme Court of Ontario to restrain the respondent company from entering upon and taking possession of a strip of land belonging to her. The company, which was incorporated under, and governed by, the National Railway Act, 1919, relied on the power to take land given by the Expropriation Act and the Railway Act, which Acts were in parts and with modifications made applicable by s. 13 of the special Act.

The trial judge (Orde J.) dismissed the action, being of opinion that the land had been validly taken under the incorporated provisions of the Expropriation Act.

The Appellate Division (Latchford C.J., with Middleton, Marten and Riddell JJ.) affirmed the decision, but on the ground that the land had been validly taken under the incorporated provisions of the Railway Act. The judgment is reported at 56 Ont. L. R. 653.

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The facts of the case and the relevant statutory provisions appear from the judgment of the Judicial Committee.

Pending the trial of the action the respondent company petitioned the Exchequer Court of Canada for a warrant of possession. The petition was rejected on the ground that the Court had not jurisdiction. The respondent company appealed to the Supreme Court of Canada. The Minister of Justice proceeded to that Court also upon a reference raising the questions whether the taking of land by the company was governed by the Railway Act or by the Expropriation Act, and whether the Exchequer Court had jurisdiction to grant a warrant of possession. The Supreme Court heard both matters together, and by a judgment delivered on November 2, 1925, and reported at [1925] S. C. R. 239, held that the Expropriation Act and not the Railway Act applied, also that the Exchequer Court had jurisdiction. The Court also expressed the view that the land had been taken validly under the Railway Act, but that view was based apparently upon [the view in the Appellate Division that the order of the Railway Board directed the expropriation.

1926. June 24, 25, 28, 29. *Nesbitt K.C.*, *W. R. Smyth K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant.

Tilley K.C., *E. S. Fraser K.C.* and *Pritt* for the respondents.

The arguments as to the effect of s. 13 of the special Act as regards the power to take land are sufficiently indicated by the judgment of the Judicial Committee. On a contention for the appellant that in any case the power could not be exercised since, as was contended, the land was required merely to mitigate the compensation payable to persons affected, reference was made to *Lord Carington* v. *Wycombe Ry. Co.* (1); *Denman & Co.* v. *Westminster Corporation* (2); *Municipal Council of Sydney* v. *Campbell.* (3) On behalf of the respondents reference was made to *Toronto Ry. Co.* v. *Toronto City* (4), and (on a contention that in any case no

(1) (1868) L. R. 3 Ch. 377, 381.
(2) [1906] 1 Ch. 464.
(3) [1925] A. C. 338.
(4) [1920] A. C. 426.

injunction should be granted) to *Parkdale Corporation* v. *West.* (1)

July 30. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. A portion of the track of the Canadian National Railway Co., entitled its Newmarket Subdivision, running north and south crossed on the level Bloor Street running east and west in the city of Toronto.

In the spring of 1924, the Corporation of the City of Toronto made an application to the Board of the Railway Commissioners for Canada under ss. 257 and 259 of the Railway Act of 1919, for an order requiring the Canadian National Railway Co. to collaborate with the applicant in the preparation of a joint plan for the separation of gradients on the crossing of Bloor Street, and as to certain other crossings which need no longer be referred to.

Following that application the Board, on June 5, 1924, pronounced the following order :—

" 1. That the Canadian Pacific and the Canadian National Railway Companies be, and they are hereby, directed to construct, jointly, two subways, one under the double tracks of the Galt Subdivision and the Toronto, Grey and Bruce Subdivision of the Canadian Pacific Railway Co. and the Brampton Subdivision of the Canadian National Railway Co. on Bloor Street, and one under the said tracks on Royce Avenue, in the city of Toronto, Province of Ontario.

2. That the Canadian National Railway Co. be, and it is hereby, directed to construct a subway under the tracks of its Newmarket Subdivision on Bloor Street, in the said city of Toronto.

3. That plans showing the two subways on Bloor Street be filed by the railway companies, for the approval of the chief engineer of the Board, within thirty days from the date of this order; and that plans showing the Royce Avenue subway be filed, for the approval of the chief engineer of the Board, not later than January 1, 1925; detail plans of

(1) (1887) 12 App. Cas. 602, 616.

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the said work also to be filed for the approval of the chief engineer of the board.

4. That the work on the two subways at Bloor Street be commenced not later than August 1, 1924, and completed not later than July 1, 1925.

5. That the work on the subway at Royce Avenue be commenced as early in the spring of 1925 as convenient, and completed not later than January 1, 1926.

6. That all questions of distribution of costs, interest, or other matters involved in the construction of the said work be reserved for further order of the Board."

Pursuant to this order a plan was lodged within the prescribed date within thirty days of the advertisement, and was approved on July 10, 1924. This plan consisted of a section showing the curve at which the subway dropped under the railway which was then to be carried over the subway by a bridge, and the position of the side walk which underneath the bridge did not extend to the lowest point of the curve. It also gave a plan which showed Bloor Street as it would then be, together with the existing buildings and properties, contiguous thereto. It did not show that any work was intended to be constructed other than the construction of the subway itself, i.e., that the existing Bloor Street was to be excavated so as to form a curve on the roadway arriving at its lowest point under the railway which was there to be carried by a bridge, and regaining the level when going from east to west at a spot opposite the middle of Boland's Buildings. No details as to retaining walls, etc., were given.

To make the case intelligible it is now necessary to describe the locus. All that is relevant is the condition of affairs on the south side of Bloor Street. Previous to these operations the properties westward from the railway line were as follows : The Fairbank property with a frontage of about 160 feet to Bloor Street ; the Loblaw property with a frontage of about 130 feet, and then the Boland property. The Fairbank property and the Loblaw property had direct access on the level to Bloor Street. At the extreme west of the Loblaw

property there was a strip of ground 12 feet wide which touched Boland's boundary on the west, and had its eastward boundary formed by Loblaw's warehouse. It became obvious from the plan and section that the subway being constructed, Loblaw's property and the Fairbank property would have no longer access to Bloor Street on the level but would find themselves a considerable number of feet above the track of the subway. This position of affairs gave food for thought on the part of the railway engineer in charge of the work, and he seems some time in the summer of 1925, to have held a colloquy with his colleague in the Land Department, the result of which was that they devised a scheme for securing a new entrance which should be available to Fairbank and Loblaw's to get access to Bloor Street. For that purpose a plan was constructed to that effect. It was proposed to take a strip of about 30 feet wide at the extreme east of the Boland property. That added to the existing 12 feet strip would make a strip of 42 feet wide. On this strip it was proposed to construct a roadway leading down into the subway at a gradient of considerable steepness. The plan was communicated some time in October to Mr. Harris, the city's Commissioner of Works. The city did not like the proposal, because they thought that a steep roadway at right angles into the subway, and likely to be used by heavy motors with trailers from Loblaw's works, would be a source of danger to the traffic in Bloor Street. The railway people, however, took the matter into their own hands, and having made a larger and working plan, they had it signed by a vice-president of the railway, and assuming that under the powers of the Expropriation Act that gave them power to take the strip of Boland's land they sent men to the land to take possession.

Mrs. Boland, acting through her son, objected to her land being taken, and after some preliminary discussion as to procedure, Mrs. Boland raised the present action in the Supreme Court praying for an injunction restraining the railway company from taking her land.

The action depended before Orde J. The railway authorities

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conceived at this time that they had ample power to take under the Expropriation Act. The plan showing the taking of lands had been submitted to the city, but they had refused to agree to it. Witnesses were examined, and the hearing of the case concluded, but after the hearing of the case and before judgment had been delivered, the railway company presented the new plan to the chief engineer of the Railway Board and obtained his approval to it, whereupon Orde J. ordered it so approved to be put in as an exhibit. He then delivered judgment dismissing the action. His judgment rested on the view that the taking of the land was permissible under the powers conferred on the railway company by the Expropriation Act. He did not rest his judgment on any authority conferred by the Railway Board.

The plaintiff appealed, and the Appellate Division of the Supreme Court dismissed the appeal. Riddell J. agreed with Orde J. The other learned judges of that Court, while in no way expressing disapproval of the views of Orde J., did not rest their judgment on his grounds. They thought it sufficient to say that the authority of the Railway Board had been given for the taking in question. Appeal against these judgments has been taken to His Majesty in Council.

The questions raised are difficult and complicated. It will be well first to set forth the various statutes which confer powers on the railway company in an action like the present. The first statute that falls to be considered is the special Act of the railway company, the National Railway Act of 1919.

Sect. 13 of that Act runs thus: "(1.) All the provisions of the Railway Act (excepting those provisions which are inconsistent with this Act, and excepting also the provisions of the Railway Act relating to the location of lines of railway, the making and filing of plans and profiles—other than highway and railway crossing plans—and the taking or using of land) shall apply to the company and its undertaking, it being declared that all the provisions of the Expropriation Act, except where inconsistent with this Act, apply mutatis mutandis to the company and its undertaking, in lieu of the provisions of the Railway Act so excepted.

"(2.) With respect to the undertaking of the company: (*a*) Any plan deposited under the provisions of the Expropriation Act may be signed by the Minister of Railways and Canals on behalf of the company, or by the president or any vice-president of the company: no description need be deposited; (*b*) The land shown upon such plan so deposited shall thereupon be and become vested in the company, unless the plan indicates that the land taken is required for a limited time only, or that a limited estate or interest therein is taken; and by the deposit in such latter case the right of possession for such limited time or such limited estate or interest shall be and become vested in the company; (*c*) The compensation payable in respect of the taking of any lands so vested in the company, or of interests therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with notice of expropriation to the opposite party."

Sub-s. 1 employs a very involved method of expression, but their Lordships do not think that there is any real difficulty in the meaning of it, and indeed there has not truly been any controversy so far between the parties to the suit. What is to be discussed is what Acts can be looked at for the power necessary for the construction of a subway under a railway where there is an existing highway crossed by an existing railway on the level. It does not seem to matter whether you read the expression "plans" and "railway crossing plans" as including the authorization of the construction of the crossing indicated by the plans, or if you confine the word "plans" to the meaning of a piece of paper with a drawing on it. In the latter view authorization of a railway crossing is not included in the enumerated exceptions. In the former it is included in the exception upon the exception, so that in either case the matter remains subject to the Railway Acts. Equally clearly, for the actual process of taking lands you must go to the Expropriation Act, but here it is necessary to accentuate a distinction which their Lordships think, in argument at least, has occasionally been lost sight of. The

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Expropriation Act has a double function. It may, as will be seen from some of its provisions, actually give the power to take land. It may also only act as the machinery by which land authorized to be taken by some other authority is actually taken. It was in respect of its former function that the railway company in this case purported to act, and it was in that respect that they secured the judgment of the learned judge of first instance.

Pausing for a moment before coming to the actual terms of the Expropriation Act, let it be observed that it follows from what has been said that the initial movement as to dealing with the crossing was rightly taken under the Railway Act. Now the section of the Railway Act which deals with that is s. 257, which is as follows: "(1.) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

(2.) When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking

of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

(3.) The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision."

Accordingly, the order already quoted was a perfectly legal and proper order. Now as to the Expropriation Act, the relevant sections are as follows :—

" In this Act, unless the context otherwise requires,

2.—(*a*) ' minister ' means the head of the department charged with the construction and maintenance of the public work ; . . . . (*d*) ' public work ' or ' public works ' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only ; . . . . The minister may by himself, his engineers, superintendents, agents, workmen and servants . . . . 3. (*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto ;

11. In all cases, when any such plan and description, purporting to be signed by the deputy of the minister, or by the secretary of the department, or by the superintendent of

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the public work, or by an engineer of the department or by a land surveyor duly licensed as aforesaid, is deposited of record as aforesaid, the same shall be deemed and taken to have been deposited by the direction and authority of the minister, and as indicating that in his judgment the land therein described is necessary for the purposes of the public work; and the said plan and description shall not be called in question except by the minister, or by some person acting for him or for the Crown."

The powers given by this enactment are very far-reaching, and the argument for the respondents which was practically given effect to by Orde J. was that in this case the railway authorities were placed in the shoes of the minister and, subject to possible control by him, could without question (s. 11) serve a plan and take any land they pleased. Their Lordships think that this is a complete misconception of the position. Turning again to s. 13 of the special Act, it provides that for the provisions of the Railway Act as to taking of lands are to be substituted mutatis mutandis the provisions of the Expropriation Act. Now the provisions of the Railway Act as to taking lands were contained under the fasciculus of ss. 189–214, whereof the heading is "taking and using of lands," together with the succeeding fasciculus, 215–243, under the heading "expropriation proceedings." These are all gone: the Expropriation Act is to come in instead mutatis mutandis; and what mutatis mutandis means is clearly shown by sub-s. 2 of s. 13.

With regard to the undertaking of the company any plan deposited may be signed by the Minister of Railways, or by the president or any vice-president of the company, and by sub-s. 3, any land so shown becomes thereupon vested in the company.

The effect of these provisions is that the company authorities get the position of the minister not absolutely, as the respondents argue, but solely for the purposes of the undertaking of the railway. The undertaking is to the railway company what the public work is to the minister. The Expropriation Act can only come in if the necessity for taking

the land is such that had s. 13 not cut out the railway clauses, the land could have been taken under the clauses in the Railway Act. Now, so far as the railway proper is concerned, no one can pretend that the present proposed taking of lands is for the purpose of the railway proper. The question, therefore, resolves itself into this: Is the subway part of the undertaking of the railway? Their Lordships consider that it is not. The expression "subway" has been used, and it is convenient, but in fact, what has been done is merely a lowering of the road and the construction of a new railway bridge. Their Lordships do not doubt that the lowered road still remains, as it was, part of the road belonging to the municipality. They might put sewers under it or gas pipes along it, and could not be restrained by the railway authorities —assuming, of course, that these things so done did not in any way interfere with the position of the railway proper.

Their Lordships are, therefore, of opinion that the ground of judgment of Orde J. fails. It is, of course, not open to any judicial tribunal to question the wisdom of the legislature when the terms of the legislation are explicit, but in order to aid construction it is legitimate to look at the opposing contentions. If Orde J.'s view were right the result would be very astounding. The railway authorities would have the right to take any land anywhere for any purpose whatever, and with the immunity from giving explanation afforded by s. 11 they could requisition lands which had no connection with the undertaking, and they might proceed to dispose of them or use them as they pleased. Even as it is, the powers are very wide, for they get rid of much procedure and some checks which would have affected them had the proceedings been under the Railway Act. It is not a conclusion to be easily reached that they should act in such a matter with all the powers of an autocratic despot.

There remain, however, the grounds of judgment of the learned judges of the Appellate Division, and here the question becomes a very narrow one. Whether the Railway Board could give directions, in ordering the subway, to effect such other changes in respect to access as to necessitate the

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taking of land, need not be, for the moment, considered. The point is whether the direction was given. The learned judges of the Appellate Division thought that the order of June 5 of the Railway Board gave that direction. Their Lordships do not arrive at that conclusion. The plan of the subway was to be lodged by July 5, 1924, and the plan so lodged confessedly showed no indication of any road of approach or taking of land. The respondents argued that inasmuch as detailed plans were also ordered to be subsequently put in, the plan showing the construction of the access was really a detailed plan, and as such obtained the sanction of the engineer. Their Lordships think that detailed plans must be detailed plans of what was actually lodged as the general plan, and that it was not within the liberty given by the Board that the railway company should, by means of a so-called detailed plan, enlarge the scope of the original plan which had been lodged by July, 1924. That plan was the measure of their rights to construct. Detailed plans are only to show the precise way in which the construction was to be made. Their Lordships therefore think that the learned judges of the Appellate Division are really wrong in fact, when they say that the plans showing the access and the taking of lands received the sanction of the Board.

Their Lordships wish emphatically to state that in coming to this opinion they are not for a moment influenced by proceedings which subsequent to judgment were taken before the Railway Board to elicit from the Board their view of the true meaning of the order of June 5, 1924. These proceedings were improper and irregular, and the petition to have these proceedings admitted in evidence before their Lordships will fall to be dismissed with costs.

On the main case their Lordships think that the appeal should be allowed, and an injunction granted against the respondents interfering with the appellant's land. There is a prayer for damages. Their Lordships do not know whether this will be insisted in, or whether there is any real substance in it, but the Appellate Division will deal with that. The

appellant will have costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty in accordance with the views above stated.

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Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Freshfields, Leese & Munns.*

[PRIVY COUNCIL.]

STEVENSON . . . . . APPELLANT;

AND

FLORANT . . . . . RESPONDENT.

J. C.* 1926 *Oct.* 21.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Custody of Infant—Minor in Care of Tuteur—Right of Parent to Custody—Interest of Child—Change of Religion—Habeas Corpus—Civil Code, arts. 113, 243, 290—*Code of Civil Procedure, arts.* 3, 1114.

The rights of the tuteur of a minor under the Civil Code of Quebec do not enable him to resist the right thereunder of the parent to the custody of the minor.

A widowed mother took proceedings under art. 1114 of the Civil Procedure Code of Quebec to recover the custody of her female child from the tuteur who had been appointed by the Court nine years previously when the child was two months old, the mother then renouncing her right to be appointed. The proceedings were in the nature of a petition for a writ of habeas corpus. The Supreme Court of Canada (affirming two lower Courts) ordered that the child should be delivered to the custody of the mother:—

Held (1.), that on all the facts of the case it was in the interest of the child that she should be placed in the care and custody of her mother, although that involved a change in the religion in which she was being brought up; (2.) that the mother's right of custody prevailed over the right of the tuteur; and (3.) that the result arrived at in Canada on the merits should not be rendered ineffective on the technical objection that the proceedings should have been by action, an objection which, if valid, could properly have been set aside under art. 3 of the Code of Civil Procedure.

Judgment of the Supreme Court [1925] S. C. R. 532 affirmed.

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* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD CARSON, SIR THOMAS WARRINGTON, and SIR JOHN WALLIS.

J. C.
1926
STEVENSON
v.
FLORANT.

APPEAL (No. 102 of 1925) by special leave from a judgment of the Supreme Court of Canada (June 18, 1925) affirming a judgment of the Court of King's Bench for Quebec, Appeal Side (December 13, 1924), which affirmed a judgment of the Superior Court of that Province.

On January 4, 1924, the present respondent petitioned the Superior Court of Quebec under art. 1114 of the Civil Code of Procedure to obtain the custody of her female child, Gertrude Stevenson, the proceedings under that article being in the nature of a petition for a writ of habeas corpus. The appellant, the paternal grandfather of the child, had been appointed by the Court her tuteur in December, 1914, the respondent then renouncing her right to be appointed.

The facts are stated in the judgment of the Judicial Committee.

The Supreme Court of Canada (affirming the two lower Courts above mentioned) ordered the appellant to surrender the child to the possession of the respondent, her mother. The unanimous judgment of the Court (Anglin C.J., with Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by Rinfret J. and is reported at [1925] S. C. R. 532.

1926. July 16, 19. *Hon. Geoffrey Lawrence K.C.* and *Bruneau* for the appellant.

Clauson K.C. and *Lacoste K.C.* for the respondent.

Oct. 21. The judgment of their Lordships was delivered by

SIR THOMAS WARRINGTON. This is an appeal, brought by special leave of His Majesty in Council, from an order of the Supreme Court of Canada, affirming an order of the Court of King's Bench, Appeal Side, which itself affirmed an order of the Superior Court of Montreal.

The last mentioned order was made upon an application under art. 1114 of the Quebec Code of Civil Procedure, and ordered the appellant to surrender to the care and custody of the respondent a child named Gertrude Stevenson, at that time (May 22, 1924) of the age of nine years and six months or thereabouts.

The respondent is the mother of the child. The appellant is her paternal grandfather, and was duly appointed her tuteur under the provisions of the Civil Code of Quebec.

The questions raised by the appeal are: 1. Whether the tuteur can successfully resist the mother's demand for the custody of her child by asserting his position as tuteur. 2. Whether proceedings under art. 1114 of the Code of Civil Procedure were proper for the purpose of determining the question. 3. Whether on the merits, and in the interest of the child, the order for her delivery into the care and custody of the mother ought to have been made.

These questions have all been answered by the Canadian Courts in the respondent's favour.

The child is the daughter of Archibald Stevenson and the respondent. Her parents were married on April 30, 1912. The respondent is a Roman Catholic. Archibald Stevenson was brought up as a Protestant, but shortly before his marriage was baptized as a Roman Catholic. The marriage took place in a Roman Catholic church. Archibald Stevenson died on February 26, 1914, the child was born at the house of her maternal grandmother on September 19, 1914, and was baptized as a Roman Catholic on the following day.

The respondent was left entirely without means to support herself and her child, and in the month of November, 1914, when the child was about two months old, she and her mother went to live with the appellant and his wife at their farm at St. Sophie, about thirty miles from Montreal. After a time, however, the respondent desired to return to Montreal and endeavour to make her living, and it was ultimately arranged that steps should be taken to obtain the appointment of the appellant as tuteur, the respondent surrendering her right to be appointed tutrice.

The family council was accordingly summoned and advised the appointment of the appellant, and on December 28, 1914, the parties all appeared before a Deputy Prothonotary of the Superior Court of Quebec, who ratified and confirmed the advice of the council and ordered that the appellant

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should be and remain tuteur to the child, the mother (the respondent) having renounced the charge of tutrice.

From that time the appellant and his wife (now dead) have had the sole custody of and have maintained and educated the child, but the respondent has frequently visited her and has taken her presents of clothes, toys and so forth. The child has been educated as a Protestant.

The respondent had a hard struggle to make a living, but towards the end of 1923 she was in the employment of the Canadian Pacific Railway Co., receiving a salary of $100 a month. She then, considering herself in a position adequately to support her child, requested the appellant to place her in her charge, informing him that for the purpose of education she proposed to place her as a boarder at a Pensionnat in Montreal kept by nuns and to make such arrangements for holidays as would enable her to see as much as possible of her grandparents. The appellant, however, refused to give her up and, after an ineffectual attempt to obtain possession of her by force, the present application was made under art. 1114 of the Code of Civil Procedure, being in substance of the same nature as an application in this country for a writ of habeas corpus.

The result in Canada of these proceedings has been stated above. The Courts in Canada have all come to the conclusion that it is in the best interests of the child that the care and custody of her person and the direction of her education should be entrusted to her mother, the respondent. Their Lordships agree with this view. The tutor, her grandfather, is now over eighty years of age. Since the commencement of the present proceedings her grandmother has died, and the only female influence of which there is any evidence is that of a great-aunt, who must be of considerable age, and a school teacher of the Jewish faith. On the materials before the Courts in Canada there was no suggestion of any immorality or other defect in character on the part of the respondent which would disqualify her from having the care of her daughter. Under these circumstances it seems to their Lordships that the Courts in Canada were right in holding

that it is in the interests of the child that she should now have the advantage of the natural care of and association with her mother, and learn to treat her home as her own and to look up to her as the person having authority to direct her education and conduct. As to the question of religion, the child is now under twelve years old; at the time of the institution of the proceedings she was more than two years younger. It is not likely that she has formed such definite views on religious matters that a possible change in this respect would be a serious shock to her, and their Lordships, therefore, do not think that there is anything on this head which would counterbalance the advantages of a change of custody and control already referred to.

Under these circumstances the appellant is driven to attack the order appealed from on legal and technical grounds only.

The first and principal ground of attack is founded on the contention that, according to the true construction and effect of the Code Civil, the tuteur, so long as he occupies that position, is the only person entitled to have the care of the child, and that accordingly before the mother can exercise her parental authority she must obtain the removal of the tuteur by an order of the Court after consideration of the advice of the conseil de famille.

On this question their Lordships have the advantage of a carefully considered and reasoned judgment of Rinfret J., concurred in by Anglin C.J. and Duff, Mignault and Newcombe JJ. Of these five judges two, Rinfret J. himself and Mignault J., have special experience in the law of Quebec, and Mignault J. is the author of a well known commentary on the Code Civil. The judgment is illustrated by copious references to authorities.

Their Lordships have read this judgment several times with the assistance of counsel on both sides, and in particular with the help of the criticisms of counsel for the appellant. This part of the judgment concludes with the following passage: "Il faut donc décider que la qualité de tuteur de l'appelant ne lui confère pas sur la personne de Gertrude Stevenson des droits qu'il puisse opposer à l'autorité paternelle

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de l'intimée, qui est la mère. C'est donc à la mère et non au tuteur, qu'appartient le droit de garde et d'éducation de Gertrude Stevenson."

This decision their Lordships accept as correct, and they must, therefore, deal with the remaining objections of the appellant on the footing that according to the true construction and effect of the Code Civil, and in view of the fact that to give effect to the mother's right to the exercise of her authority is in the interests of the infant, the order appealed from is correct unless the technical objection to the form of the proceedings now to be mentioned is to be sustained.

The objection is that at the date of the issue of the writ the infant was in the custody of the appellant "under an order in a civil matter granted by a court or judge having jurisdiction"—namely, the order appointing him tuteur, and that a return to the writ stating that fact is a sufficient return.

The answer to this objection, as it seems to their Lordships, is that, holding as they do that the authority of the mother and her right to the custody of her child ought to prevail over the authority conferred on the tuteur by the order in question, and, further, that a transfer of custody from the tuteur to the mother is in the interests of the infant, they would not be disposed to treat these proceedings, in which the whole question has been considered on the merits by three Canadian Courts, as ineffective by reason of a defect in procedure, and to require the respondent to institute proceedings in another form which (according to their Lordships' view) would end in the same result.

If there be a valid technical objection to the form of proceedings, and if they ought to have been instituted by an ordinary writ of summons, the Court would properly in the interests of both parties and acting under art. 3 of the Code of Civil Procedure set aside the objection and make the order which would have been made if the form had been strictly correct.

On the whole, their Lordships are of opinion that the order appealed from is correct and the appeal ought to be dismissed

with costs, and they will humbly advise His Majesty accordingly. J. C. 1926 STEVENSON v. FLORANT.

There is, however, a further matter to be mentioned. A petition was presented to this Board asking leave to adduce further evidence, the object of such evidence being to attack the moral conduct of the respondent in the period immediately succeeding the death of her husband, now twelve years ago. Their Lordships are of opinion that this petition cannot be entertained and should be dismissed with costs, but without prejudice to any fresh application which may be made to the Courts in Canada founded on further evidence, and they will on this matter also humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[HOUSE OF LORDS.]

GUARDIANS OF THE POOR OF THE WYCOMBE UNION . . . . . } APPELLANTS;

AND

GUARDIANS OF THE POOR OF THE BARTON-UPON-IRWELL UNION . } RESPONDENTS.

H. L. (E.)* 1926 *Nov.* 22.

Poor Law—Settlement—Illegitimate Child under Sixteen Years of Age—Derivative Settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

The mother of an illegitimate child married, and she and her husband acquired a settlement by residence in a parish in the Wycombe Union. Shortly before the marriage the child, then aged three years and a half, went to reside with strangers in a parish in the Barton-upon-Irwell Union, and resided there without relief or interruption until she was aged 15. She then resided for four years in various places without acquiring a settlement, and at the end of that period she became chargeable to the Wycombe Union:—

Held, that the child retained her mother's settlement.

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* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

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Opinion of Lord Watson in *Reigate Union* v. *Croydon Union* (1889) 14 App. Cas. 465, 484, and the decision of the Court of Appeal in *West Derby Union* v. *Atcham Union* (1889) 24 Q. B. D. 117 followed.

Tendring Union v. *Braintree Union* [1920] 2 K. B. 647 and *Lexden and Winstree Union* v. *Windsor Union* [1921] 2 K. B. 143 overruled.

Decision of the Court of Appeal [1926] 2 K. B. 3 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a decision of a Divisional Court upon a case stated by the Buckinghamshire Quarter Sessions. (2)

Louise Madge Brant was the illegitimate child of one Margaret Baxter (formerly Brant), and was born on September 25, 1905, in Lambeth, the mother being then a spinster. The child had no other settlement than that of her mother before March, 1909.

On March 17, 1909, the mother married Ernest Edward Baxter, and she and her husband resided in various places until December, 1913. Since that time they had resided continuously in the parish of Chepping Wycombe in the Wycombe Union in such manner and under such circumstances as to acquire a settlement in that parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

In February, 1909, Louise Madge Brant went to reside at Walkden in the parish of Worsley in the Barton-upon-Irwell Union with one George Pennington and his wife, and she resided there without relief or interruption until June, 1920. Neither the mother nor her husband had ever resided in the parish of Worsley.

From June, 1920, until October 22, 1924, Louise Madge Brant resided in various places without acquiring a settlement, and on the latter date she, with her infant child, became chargeable to the guardians of the Wycombe Union. On December 5, 1924, an order was made by two justices of Buckinghamshire for the removal of Louise Madge Brant and her infant child to the Barton-upon-Irwell Union.

On appeal, quarter sessions held that Louise Madge Brant was not legally settled in the parish of Worsley and quashed the order of the justices, subject to the opinion of the Court.

(1) [1926] 2 K. B. 3. (2) [1926] 1 K. B. 212.

The Divisional Court (Lord Hewart C.J., Avory and Sankey JJ.) reversed the order of quarter sessions and restored the order of the justices.

The Court of Appeal (Bankes, Warrington and Atkin L.JJ.) reversed the decision of the Divisional Court and restored the order of quarter sessions.

1926. Nov. 19, 22. *Montgomery K.C.* (with him *Herbert Davey*) for the appellants. The true effect of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (1), in its application to an illegitimate child is that such child shall in no case take any settlement its mother has derived or may derive by marriage. Louise Madge Brant must, therefore, from the date of her mother's marriage be deemed to have been legally settled in the parish where she was born until she acquired another settlement in her own right. An illegitimate child under 16 years of age is capable of acquiring a settlement by residence in a parish in such manner and under such circumstances as would render it irremovable, and, on the facts, Louise Madge Brant did acquire such a settlement in the parish of Worsley in the respondents' union. It is said that the third paragraph of s. 35 has no application to children under 16 years, and Lord Watson's opinion to that effect in *Reigate Union* v. *Croydon Union* (2) is relied on, but that opinion is dictum only; it has frequently not been followed, and it involves reading a number of words

(1) The Divided Parishes and Poor Law Amendment Act, 1876, s. 35:—

"No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 14 App. Cas. 465, 484.

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into the paragraph. The subsequent decisions of this House are inconsistent with that dictum: *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (1); *Plymouth Union* v. *Axminster Union* (2); *West Ham Union* v. *Holbeach Union* (3); *Fulham Union* v. *Woolwich Union* (4); *Hackney Union* v. *Kingston-upon-Hull Incorporation for the Poor.* (5) Before 1889 the construction of this third paragraph of s. 35 for which the appellants are contending was adopted in several cases: *Reg.* v. *Leeds Union* (6); *Manchester Overseers* v. *St. Pancras Guardians* (7); *Hollingbourn Union* v. *West Ham Union* (8); *Northwich Union* v. *St. Pancras Union.* (9) Then came Lord Watson's dictum. That dictum was accepted by the Court of Appeal in *West Derby Union* v. *Atcham Union.* (10) But in two recent cases the Divisional Court has taken the view of the Act which the appellants now put forward: *Tendring Union* v. *Braintree Union* (11); and *Lexden and Winstree Union* v. *Windsor Union.* (12) In the latter case Avory J., after a careful analysis of the authorities, said that the House of Lords, by holding in subsequent cases that a child under 16 could acquire a settlement for itself by residence, had destroyed the substratum of the argument upon which Lord Watson's opinion was based and had also destroyed the authority of the decision of the Court of Appeal in *West Derby Union* v. *Atcham Union.* (10) If Louise Brant on her mother's marriage was relegated to her birth settlement there was nothing to prevent her from acquiring a settlement by residence in the respondents' union. The proviso to s. 1 of the Poor Removal Act, 1846, as amended by the Poor Removal Act, 1848, does not apply to illegitimate children. That was so held by the Court of Appeal in *Woolwich Union* v. *Fulham Union.* (13) That decision was affirmed by the House of

(1) [1894] A. C. 230, 238–9.
(2) [1898] A. C. 586, 590, 591.
(3) [1905] A. C. 450.
(4) [1907] A. C. 255, 261.
(5) [1912] A. C. 475.
(6) (1879) 4 Q. B. D. 323.
(7) (1879) 4 Q. B. D. 409.
(8) (1881) 6 Q. B. D. 580, 582.
(9) (1888) 22 Q. B. D. 164, 168.
(10) 24 Q. B. D. 117.
(11) [1920] 2 K. B. 647.
(12) [1921] 2 K. B. 143, 156.
(13) [1906] 2 K. B. 240.

Lords (1) on other grounds, but there is a dictum to the contrary by Lord Macnaghten. On the other hand Lord James of Hereford expressed his agreement with the judgment of Stirling L.J. on this point.

[VISCOUNT CAVE L.C. In *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2) Lord Herschell takes the same view of the proviso as Lord Macnaghten.]

It is suggested that Lord Herschell was not there referring to illegitimate children. In a statute where the word " child " is used, prima facie it means a legitimate child, and this is especially true of statutes passed in 1846 and 1848, when the idea of putting legitimate and illegitimate children on the same basis was in its infancy. This construction is assisted by s. 3 of the Act of 1846, where the term " illegitimate child " is used.

Macmorran K.C. and *Humphrey Paul* for the respondents. Lord Watson's opinion as to the effect of the third paragraph of s. 35 was deliberate. The previous decisions on the construction of ss. 34 and 35 were inconsistent. Accordingly the appeals in the *Reigate Union* case (3) were taken to the House of Lords to obtain an authoritative interpretation of the statute, and Lord Watson delivered a comprehensive judgment on the construction of these sections. That opinion was accepted by the Court of Appeal in *West Derby Union* v. *Atcham Union* (4), and it has never been questioned, except in the two recent cases in the Divisional Court. It has been recognized as law for thirty years, and it is right. It is said that the subsequent decisions of the House of Lords are inconsistent with that opinion, but, so far from that being the case, they are really founded upon it. The effect of Lord Watson's opinion has been misunderstood by the Divisional Court. Lord Watson did not intend to say that an illegitimate child under 16 could not obtain a settlement by residence: see per Collins M.R. in *West Ham Union* v. *Holbeach Union*. (5) But his opinion does involve that an

(1) [1907] A. C. 255, 261, 262.
(2) [1894] A. C. 230, 237.
(3) 14 App. Cas. 465.
(4) 24 Q. B. D. 117, 130.
(5) [1904] 2 K. B. 121, 129; affirmed [1905] A. C. 450.

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illegitimate child under 16 cannot obtain a settlement by residence apart from its parent. There is nothing in any of the decisions of the House of Lords opposed to that view, and in *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (1), Lord Herschell expressly disapproved *Reg.* v. *Leeds Union* (2), which had decided the contrary.

Montgomery K.C. replied.

VISCOUNT CAVE L.C. My Lords, in my opinion, the result of this appeal must depend upon the answer to be given to the question whether the third paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, beginning "If any child in this section mentioned," and so on, applies to an illegitimate child under the age of 16. If it does so apply, it may well be that the appellants are entitled to succeed in this appeal; if not, then the appeal must fail.

Upon this question there is authority. In the case of the *Reigate Union* v. *Croydon Union* (3), decided in this House in the year 1889, Lord Watson, in the course of a careful analysis of the section, said this: "The provisions of the clause"—that is, the third paragraph of s. 35—"have, in my opinion, no application to children under the age of sixteen, and do not qualify the preceding enactment of s. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4, to the effect that an illegitimate child shall continue to retain its parentage settlement until it has reached that age." It has been said with truth that on the facts of that case this particular point did not arise, but nevertheless the opinion of Lord Watson carries great weight, not only as expressing the view of that very learned lawyer, but as a link in the chain of argument upon which that case was decided. The opinion so expressed by Lord Watson was followed and acted upon by the Court of Appeal in the same year in *West Derby Union* v. *Atcham Union* (4), and in that case Lindley L.J. (as he then was) said this: "It would be wrong, in my opinion, not to carry into effect that interpretation so put by the House of Lords upon the statute,

(1) [1894] A. C. 230, 238–9.
(2) 4 Q. B. D. 323.
(3) 14 App. Cas. 465, 484.
(4) 24 Q. B. D. 117, 121.

and I do not think in future it will be thought to be of any use to fall back upon the earlier decisions, many of which are extremely difficult to reconcile with each other." Lord Watson's opinion was subsequently referred to in more than one case in this House, for instance, in the case of the *Fulham Union* v. *Woolwich Union* (1), and it has not hitherto been questioned here; nor, in my view, is there anything in the decisions of the House of Lords in 1905, in 1907, and in 1912, which have been cited to the House, which is inconsistent with the passage which I have quoted from Lord Watson's speech in the *Reigate* case. (2)

Further, on consideration of the terms of the section, I respectfully agree with Lord Watson's view. It had already been enacted by s. 71 of the Poor Law Amendment Act, 1834, that a bastard child should have and follow the settlement of the mother of such child until such child should attain the age of 16 or should acquire a settlement in its own right; and accordingly the provision in the second paragraph of s. 35 of the Act of 1876, that an illegitimate child shall "retain" the settlement of its mother until such child acquires another settlement must, I think, refer, not to an illegitimate child under the age of 16, for whom provision had already been made by the earlier Act, but to an illegitimate child who has attained that age. If the second paragraph of the section be so construed, then the expression in the third paragraph "any child in this section mentioned" does not upon its true construction include a bastard child under 16 years of age. Whether this was the reasoning on which Lord Watson proceeded I am not sure, but in any event it has led me to the same conclusion.

For these reasons I am of opinion that the third paragraph of s. 35 of the Act of 1876, on which the appellants rely, has no application to this case.

In saying that this is the only point involved in the appeal, I have not overlooked the suggestion that the proviso in the Act of 1848 does not apply to an illegitimate child; but I think that that contention was settled the other way

(1) [1907] A. C. 255. (2) 14 App. Cas. 465, 484.

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in the *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (1), and also by the opinion of Lord Macnaghten in the *Fulham* case. (2)

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed, with costs.

LORD ATKINSON. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, in agreeing I desire to say that I assent to, and respectfully adopt, Warrington L.J.'s judgment delivered in the Court of Appeal, which not only states accurately the principles to be applied, but also gives a summary of the authorities, which, in my opinion, is of great value.

The second observation which I wish to make is this: The *Reigate* (3) decision of this House was made in 1889, and was arrived at in full view of the cases decided between the year 1876 (the year of the Act of Parliament in question) and the year 1888. Those cases were four in number, they did not harmonize with each other, and it was plain that a judgment of this House was demanded, as in a sense regulative of the construction to be placed upon ss. 34 and 35 of the statute. Such a judgment was accordingly pronounced. But these preceding cases were cited in this House all over again and were powerfully commented upon.

My Lords, I look upon such citation as really going beyond the scope of what can be considered effective argument. My particular reason is this: The judgment of Lord Watson, agreed to by Lord Fitzgerald, was made the express subject of attention in the succeeding case of the *West Derby Union* (4) and was accepted in the general and regulative sense to which I have referred. The judgment of Lindley L.J., in particular, prescribes it as a general rule to be accepted and adopted in parochial settlements in England. It has been so adopted and accepted throughout the country and by the profession and the administrative bodies concerned for over a generation. Notwithstanding

(1) [1894] A. C. 230.
(2) [1907] A. C. 255, 261.
(3) 14 App. Cas. 465, 484.
(4) 24 Q. B. D. 117, 121.

this, we have had this able and prolonged argument. I do not, my Lords, venture to go further than humbly to say that the attack made upon the construction and exposition of s. 35 of the Act of 1876 by Lord Watson fails. So far as I might be entitled to propone any judgment upon the subject to the House, it would be one to the effect that Lord Watson's judgment upon that topic was unquestionably sound.

LORD SUMNER. My Lords, I agree that the appeal fails for the reasons which have been given by the Lord Chancellor.

There are only two observations I should like to add. The first is that from 1888 until *Tendring Union* v. *Braintree Union* (1) and *Lexden and Winstree Union* v. *Windsor Union* (2), that is to say, for 30 years and upwards, the settlement of liabilities between Poor Law Unions must have been regularly made upon the footing that the law, as laid down by Lord Watson and as followed afterwards by the Court of Appeal, is correctly stated, and I think it would be very undesirable to upset a course of settlements of that kind. The second is that, as was pointed out by Atkin L.J., the construction now asked for would tend to increase the number of cases, in which a child might be separated from its parents and removed to another parish, merely because of the conflict between two poor law unions, equally reluctant to bear the expense of its maintenance, a result to which I could only bring myself under the constraint of the clearest possible authority.

LORD CARSON. My Lords, I concur with the motion which has been moved from the Woolsack.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, NOV. 22, 1926.

Solicitors for the appellants: *Ward & Melliar Smith, for Reynolds & Son, High Wycombe.*

Solicitors for the respondents: *Reid, Sharman & Co., for Waddington & Morgan, Manchester.*

(1) [1920] 2 K. B. 647. (2) [1921] 2 K. B. 143.

[HOUSE OF LORDS.]

H. L. (N. I.)* 1926 Nov. 25.

LAGAN NAVIGATION COMPANY . . APPELLANTS;

AND

LAMBEG BLEACHING, DYEING AND FINISHING COMPANY, LIMITED . } RESPONDENTS.

Nuisance—Canal Navigation Company—Flooding of adjoining Lands—Exercise of statutory Powers—Negligence—Abatement of Nuisance by private Individual—6 & 7 Vict. c. civ., ss. 62, 144, 204.

The abatement of a nuisance by a private individual is a remedy which the law does not favour.

The authorities on this subject reviewed by Lord Atkinson.

By a local Act of 1843 a canal constructed under previous local Acts by canalizing a river was vested in the appellants, who were required by the Act to keep the navigation and locks, and all works to be thereafter executed for the improvement thereof, in an efficient state for the traffic thereon. In 1912 the appellants raised the coping on both sides of one of their locks and the banks behind it to prevent the lock from being flooded. The respondents, adjacent landowners, objected that the effect of these works was to pen back the water in the part of the canal above the lock and to occasion the flooding of their lands, and in consequence of these objections the appellants removed the coping without prejudice to their rights, but they did not reduce the height of the banks. In 1924 during a heavy flood the respondents, without notice to the appellants, cut away a portion of these banks to allow the flood water to escape.

In an action by the appellants for an injunction to restrain the respondents from interfering with the banks, the respondents justified their acts as having been done in the abatement of a nuisance caused by the appellants in raising the banks:—

Held (Lord Wrenbury deciding the case on a view of the facts which involved no question of law), (1.) that, there being no evidence of negligence, the appellants, in constructing works in the exercise of their statutory powers for the protection of their navigation, were not liable for the flooding of the respondents' lands; (2.) that, assuming that the raising of the banks and the resultant flooding constituted a nuisance, the course pursued by the respondents was not justified.

Geddis v. *Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430 and *Bligh* v. *Rathangan River Drainage Board* [1898] 2 I. R. 205 distinguished.

Nield v. *London and North Western Rly. Co.* (1874) L. R. 10 Ex. 4 followed.

Decision of the Court of Appeal in Northern Ireland [1926] N. I. 13 reversed.

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* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

APPEAL from an order of the Court of Appeal in Northern Ireland reversing a judgment of Wilson J. sitting in the Chancery Division of the High Court of Justice in Northern Ireland. (1)

The action was brought by the appellants, the Lagan Navigation Company, for an injunction to restrain the respondents from entering on the appellants' undertaking and from removing the soil at the appellants' Lock 8 and for damages.

The respondents, who were adjoining landowners, justified their acts as being executed in the abatement of a nuisance caused by the appellants raising their banks at Lock 8 and the consequent flooding of the respondents' lands and counterclaimed for a mandatory injunction to compel the appellants to remove the said banks and for damages.

Wilson J. granted the injunction claimed by the appellants and dismissed the counterclaim.

The Court of Appeal (Moore C.J. and Andrews L.J.) on the contrary held that the appellants were guilty of negligence in the exercise of their statutory powers in not providing a discharge for the additional water, and they dismissed the action and gave judgment for the respondents on their counterclaim.

The facts are fully stated in the opinion of Lord Atkinson.

1926. Oct. 21, 22, 25. *J. B. Matthews K.C.* (with him *E. Warnock* (of the North Irish Bar)) for the appellants. The appellants in raising their embankments were acting within their statutory powers. That work was necessary to protect their lock from damage and to maintain it in an efficient state for the purposes of the navigation. There is no evidence that the appellants were guilty of negligence in the exercise of their statutory powers, and no charge of negligence was made against them on the pleadings or in the arguments at the trial or in the Court of Appeal. The respondents have therefore no ground of action against them. Further, apart from their statutory powers, the appellants have a

(1) [1926] N. I. 13.

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common law right to take steps for their own protection to prevent an anticipated danger from extraordinary floods without being responsible for the consequence of injuring their neighbours, leaving it to others to protect themselves in like manner against the common enemy: *Nield* v. *London and North Western Ry. Co.* (1); *Rex* v. *Commissioners of Sewers for Pagham* (2); *Menzies* v. *Earl of Breadalbane* (3); *Maxey Drainage Board* v. *Great Northern Ry. Co.* (4), where Hamilton J. discusses and distinguishes *Hurdman* v. *North Eastern Ry. Co.* (5) and *Lawrence* v. *Great Northern Ry. Co.* (6); *Greyvensteyn* v. *Hattingh* (7); *Gerrard* v. *Crowe* (8), where all the authorities are reviewed by Viscount Cave L.C. *Geddis* v. *Proprietors of Bann Reservoir* (9) and *Bligh* v. *Rathangan River Drainage Board* (10) are distinguishable, because in each of those cases it was established that the damage done to the injured party was caused by the negligence of the defendants in the exercise of their statutory powers. In any event the respondents were not justified in invading the appellants' property without notice and cutting the embankments. That was a malicious interference with the appellants' undertaking, and it is made a criminal offence under the appellants' special Act.

Maugham K.C. (with him *A. Black* (of the North Irish Bar)), for the respondents. The appellants were entitled to raise their copings and embankments for the improvement of their undertaking, but in exercising that right they were bound to take adequate precautions to prevent the flooding of their neighbours' lands—they must provide some reasonable means of escape for the flood water. This could have been done by the construction of sluices on their own ground. *Nield* v. *London and North Western Ry. Co.* (11) is distinguishable, because there the river had no connection with the canal. In such a case it is conceded that a landowner may take all

(1) L. R. 10 Ex. 4, 6, 7.
(2) (1828) 8 B. & C. 355.
(3) (1828) 3 Bli. N. R. 414, 419–421.
(4) (1912) 106 L. T. 429.
(5) (1878) 3 C. P. D. 168.
(6) (1851) 16 Q. B. 643.
(7) [1911] A. C. 355, 359.
(8) [1921] 1 A. C. 395.
(9) 3 App. Cas. 430.
(10) [1898] 2 I. R. 205.
(11) L. R. 10 Ex. 4.

necessary steps to protect himself against a common enemy —water coming from an outside source—and that other persons cannot complain. *Maxey Drainage Board* v. *Great Northern Ry. Co.* (1) is distinguishable on the same ground. The present case is more like *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (2), where it was held that the defendants had no right to protect their property from flooding by transferring the mischief from their own land to that of the plaintiff. The appellants having a statutory right to construct their canal on a particular system, which would not have injured the respondents, they have increased the burden on their neighbours by constructing additional works on a different system, and are therefore liable for the injury done to the respondents. The appellants cannot exercise their statutory powers to the full extent without taking reasonable precautions to prevent needless injury: *Geddis* v. *Proprietors of Bann Reservoir* (3); *Lawrence* v. *Great Northern Ry. Co.* (4) As to the claim for malicious injury, the respondents' acts were not malicious, but were done bona fide in abating the nuisance for their own protection: *Lemmon* v. *Webb* (5); *Davies* v. *Williams* (6); *Jones* v. *Williams.* (7)

Their Lordships took time for consideration.

1926. Nov. 25. LORD ATKINSON. My Lords, this is an appeal from an order of His Majesty's Court of Appeal in Northern Ireland, hereinafter styled simply the Court of Appeal, dated November 4, 1925, which reversed an order of Wilson J. made by him sitting in the Chancery Division of the High Court of Justice in Northern Ireland dated March 24, 1925, in an action in the said Division, wherein the above named appellants were plaintiffs and the above named respondents were defendants.

This action was brought by the appellants for (inter alia) an injunction to restrain the respondents from entering on the appellants' undertaking and removing the soil and portion

(1) 106 L. T. 429.
(2) (1884) 13 Q. B. D. 131.
(3) 3 App. Cas. 430, 449, 452, 455.
(4) 16 Q. B. 643, 654.
(5) [1894] 3 Ch. 1; [1895] A. C. 1.
(6) (1851) 16 Q. B. 546, 555.
(7) (1843) 11 M. & W. 176, 181.

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of an embankment at the appellants' Lock 8 and for damages. The respondents justified their acts as being executed in the abatement of a nuisance caused by the appellants in raising embankments on the sides of their canal at Lock 8 thereof. They counterclaimed for an injunction to restrain the appellants from raising these banks so as to cause certain lands and premises belonging to them to be flooded. The questions at issue between the parties resolve themselves into these—namely, whether the respondents were, under the circumstances proved to exist, justified, on January 18 and January 21, 1924, in digging through and removing certain of the earthen banks built by the appellants on both sides of this Lock No. 8, situate on the Lagan Canal, which had been formed by the appellants under the statutory powers conferred upon them. The exact position of the banks so removed is shown on Map No. 1, proved in the action out of which the appeal has arisen, and the description and true position of the different places referred to in the evidence given on the trial of the action are set out on Map No. 2 similarly proved.

Before referring to the several statutes passed by the Irish and English Legislatures respectively enabling the persons and bodies therein respectively named to make a passage by water from Lough Neagh to Belfast, the River Lagan being utilized for that purpose, it would be well to refer to the respondents' defence and counterclaim to ascertain the grounds upon which they endeavoured to justify their action, especially as the case was decided in the Court of Appeal upon a ground never mentioned in the pleadings or in the notice of appeal, or dealt with at the trial of the action either in evidence or in argument. As well as I understand it the ground was this, that the appellants, though by the several statutes hereinafter referred to authorized to do the particular work complained of, did it negligently, and that therefore on the authority of *Geddis* v. *Proprietors of Bann Reservoir* (1), they had no defence to the respondents' counterclaim. The Lord Chief Justice said, in delivering judgment in the Court

(1) 3 App. Cas. 430.

of Appeal (1): "The defendants' case really rests on a different footing. It depends, not on wrongs flowing from an unauthorized exercise of power by the plaintiffs, but on misuse of powers which give the plaintiffs authority to conduct the navigation," and the other judge who heard the appeal, Andrews L.J., said (2): "The sole question to be determined appears to me to be whether the plaintiffs, who, as I hold, acted within their statutory powers, were guilty of negligence in the execution of the works complained of." This involves a minute examination of the evidence given before Wilson J. in order to discover, if possible, the proof of the negligence relied upon so confidently by the Court of Appeal in Ireland. I think, however, there can be no doubt that it is most unsatisfactory to have a case decided upon a point like this, not raised in the pleadings or apparently dealt with at the trial by the learned judge who presided there, or by the counsel appearing for the parties, or by the witnesses who were examined.

The paragraphs of the respondents' defence and counter-claim on which they mainly rely ran as follows:—

"5. The defendants were at the time of the matters alleged in the statement of claim and still are the owners and occupiers of certain lands and premises adjoining the said Lagan Canal and the River Lagan.

"6. Prior to the dates of the matters complained of in the statement of claim the plaintiff company by their servants agents and workmen wrongfully and improperly constructed and maintained certain mounds of earth on the banks on both sides of the said Lagan Canal adjoining said number 8 Lock, the effect of which was to pen back and raise the level of the water in the part of the said canal and River Lagan above the said lock in time of flood, and to throw the water of the canal and River Lagan upon the said lands of the defendants and to occasion serious flooding of the said lands and to cause the water of the said canal and river to flow into and contaminate certain spring water dams and filter beds of the defendants situated upon their said lands.

(1) [1926] N. I. 33. (2) [1926] N. I. 43.

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"7. The defendants had before the dates mentioned in the statement of claim frequently requested the plaintiff company to remove the said mounds of earth and to level down the banks of the said canal at the said lock to their original level, but the plaintiff company neglected and refused to do so.

"8. On or about the dates mentioned in paragraphs 2 and 3 of the statement of claim the waters of the said canal and River Lagan were, by reason of the said mounds of earth wrongfully constructed and maintained as aforesaid by the plaintiff company, penned and forced back and overflowed and flooded the said lands of the defendants and seriously injured the said lands and damaged and contaminated the defendants' said spring water dams and filter beds and occasioned serious loss and damage to the defendants.

"9. The defendants therefore by their servants and workmen for the purpose of abating the said nuisance and relieving the said flooding and preventing damage to their property removed the said mounds of earth or part thereof on the dates mentioned in the statement of claim doing no more than was necessary for the said purpose, and these acts of the defendants are the trespasses alleged in the statement of claim."

Many statutes were enacted by the Irish Parliament from the 27 Geo. 2 downwards enabling the undertakers therein named to make a passage by water from Lough Neagh to Belfast, the River Lagan being utilized for the purpose. The most important of these statutes is the local Act, 54 Geo. 3, c. ccxxxi., s. 2. By it the undertakers therein named were incorporated into a company by the name of the Company of Undertakers of the Lagan Navigation. It authorized and empowered this company to, amongst other things, separate part of the said Lagan Navigation between the eighth and ninth locks thereof from the said River Lagan by carrying the said navigation through certain lands of Tullynacross and by diverting the said River Lagan through certain lands in the parish of Lambeg, and to make and complete and maintain a track road for horses from Belfast aforesaid

to Lough Neagh along the banks of the said navigation, and further in such places as the said company may think fit, to make deeper and wider the bed of the River Lagan of the said navigation, and to repair, maintain, amend and uphold all such work and other things as have already been erected, made or done under and by virtue of the said recited Acts or any of them, and to make, execute, do and perform all such works, matters and things as shall be requisite and convenient for completing and maintaining the several canals by this Act authorized to be made and the navigation thereof, and for supplying the same with water, and the making, completing and maintaining the several improvements and other works above mentioned according to the true intent and meaning of the Act. By s. 17 of this statute the Act was to continue in force for twenty-one years from December 25, 1814.

The next statute to which it is necessary to refer is the 6 & 7 Vict. c. civ., by which the appellant company was incorporated. It was entitled An Act to incorporate the persons having claims upon the Lagan Navigation in Ireland, and to provide for the future management and improvement of the said Navigation; and by s. 1 it was provided that the parties therein named should be a corporate body by the name of the Lagan Navigation Company. By ss. 2 and 3 of this statute, with several other statutes, the last of which was the Ulster Canal and Tyrone Navigation Act, 1888 (51 & 52 Vict. c. cxxxvii.), it was enacted that the Acts dealing with the Lagan Canal were to continue in force for 999 years.

By the second section of this Act of 6 & 7 Vict. c. civ. the lands, waters, watercourses, bridges, sluices, drains, locks, weirs, banks, dams, roads, towing paths, and other ways, rights, privileges and advantages whatsoever which, on and previously to December 24, 1835, had been vested in the Company of Undertakers of the Lagan Navigation were vested in the Lagan Navigation Company, and it was provided that they should thenceforth have, for the purposes of the navigation, all such powers (except as thereinafter provided, which exception is immaterial to the present appeal and need not

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be stated) as, on or before December 24, 1835, belonged to or might rightfully have been exercised by the said Company of Undertakers of the Lagan Navigation.

By s. 62 of the Act it was enacted (inter alia) that the appellants should at all times keep the said navigation and every part thereof, and all locks, weirs, banks, dams, roads, towing-paths and other ways belonging or appertaining thereto, and all works to be thereafter executed for the improvement thereof, in good substantial and serviceable repair and in an efficient state for all the purposes thereof and of the traffic on the same respectively.

By s. 95 it was enacted (inter alia) that if any difference should arise as to the amount of damages occasioned to any lands by the exercise of the powers given by said Act and for which any party might be entitled to demand compensation according to the provisions of said Act, the amount of the compensation to be paid by the appellants in every such case should be settled by the verdict of a jury in manner thereinafter mentioned.

By s. 144 it was enacted (inter alia) that the appellants might repair, maintain, amend and uphold all such works and other things as had already been erected made or done under or by virtue of the therein recited Acts or any of them.

Sect. 204 imposed a penalty on any person who should wilfully and maliciously break down or damage or cause to be broken down or damaged any of the works already made, or which should be made for the use of the navigation.

These are very wide powers. The paramount purpose and object of the statutes conferring them was to secure that the system of inland navigation which it was designed to establish should be kept in repair and in effective working order, the damage occasioned to any lands by the exercise of those powers to be compensated for in the manner provided by s. 95.

The maps, which presumably were lodged in the Parliamentary offices in England and Ireland respectively when the aforesaid statutes were passed, have not been put in evidence. There is nothing to show what was the ordnance

datum of the water in the canal which was to be maintained or not exceeded, nothing to show what lands adjoining the canal were liable to floods and were thereby injuriously affected, or that compensation in respect of that damage had been paid.

Under the provisions of these Acts, the Lagan River was canalized so as to make possible navigation from Lough Neagh to Belfast Harbour. Part of the navigation consists of part of the River Lagan and part of artificial channels. A series of locks (numbered consecutively from Belfast to Lough Neagh), operating in the usual way, enabled barges to be raised to higher levels, and lowered to lower levels of the navigation as required.

A portion of the navigation from Lock 9 down towards Belfast consists of the River Lagan. About halfway down between Lock 9 and Lock 8, an artificial channel began and continued to Lock 8. The navigation between Lock 8 and Lock 7 consists of an artificial channel and below Lock 7 the canal joins the River Lagan. Lock 8 was in existence prior to the year 1843.

About halfway down between Lock 9 and Lock 8, a stone weir had been placed across the bed of the River Lagan in height 60.5 O.D., and further down the river another stone weir of the average height of 60.5 was placed. On the top of this latter weir there were placed boards 15 inches high, which, at will, could be raised or lowered. These boards have been in existence for over forty years. There is no evidence as to when or by whom or under what circumstances they were first erected. As they were proved by the respondents to have been removed for four days prior to January 18, 1924, they do not appear to affect materially the question at issue between the parties litigant after that date.

The effect of the first weir is to turn the water of the River Lagan up to a height of 60.5 into the artificial channel from the weir down to Lock 8 and allow any water above that height to flow down the river to the second or lower weir.

The effect of the latter weir is to form a dam, from which a company called the Lambeg Weaving Co., Ld., can draw

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water for their works by means of a sluice on the right bank of the river. There is a sluice on the left bank of the river also, beside the lower weir, which can be used to lower the water in times of flood. This sluice is six feet below the level of the lower weir.

The respondents own the land lying on both sides of the banks of the canal between Lock 9 and Lock 8, but not in close proximity to the latter lock. The land in close proximity to it belongs to the appellants.

The respondents carry on their business in buildings adjoining Lock 9, beyond the east or right bank of the canal, and obtain the portion of the water they require from an open artificial drain running outside the right bank of the canal on the east side thereof. This artificial drain is admittedly supplied with water from three sources. First from the Lagan Canal, the water passing through a culvert made through the right or eastern bank of the canal and emptying itself into a hole or sump (which is merely an enlargement of the back drain); (2.) from a stream running through the respondents' land on the east side of the canal; and (3.) from part of the respondents' premises named Gilmores Moss in which there is a spring. It was proved at the hearing that this Moss is flooded from time to time, but not by water coming from the canal. The banks of the Moss are 64 O.D. high, and no water from the canal could enter it unless the water in the canal rose to a height above that level, 64 O.D. There is, moreover, an aqueduct running from the respondents' artificial drain right under the canal, and thence through the respondents' lands lying on the other side of the canal down to a point on the river below the lower weir. The respondents consequently can by opening a sluice or valve on their own lands allow the water in their artificial drain to flow, before it reaches their works, through their aqueduct into the river at this latter point. Lock No. 8 was at the hearing of the case proved to be 70 feet long. It had at one time, on both sides of it a coping of masonry from 3 to 3.3 wide, with wooden gates at both ends of its chamber. The towing path is actually on the east side of the canal. The

level of the stone coping varied from 62.7 O.D. to 62.85 O.D. The lock is not as wide as the canal, and the latter is consequently narrowed above the lock so as to form a mouth or entrance to it. These are some of the most important features of the terrain. They are accurately shown on Map No. 2 proved in the trial.

The case was heard by Wilson J. sitting in the Chancery Division of the High Court of Justice in Ireland. A considerable body of evidence was given before him, and he arrived at certain conclusions of fact on the most important points in controversy at the hearing. As I understand, the conclusions so arrived at by the learned judge were substantially accepted by both parties at the hearing of the appeal in the Court of Appeal in Ireland. He deals with the facts leading up to the dispute between the parties in the following passage of his judgment, which I think it well to set out in extenso. It runs thus: "I find the facts leading up to the dispute to be: (1.) Some time prior to August, 1912, the plaintiffs raised the coping along the upper mouth of Lock 8 and down to the upper gate by placing concrete along it to the height of about 15 inches and raised the embankment on both sides of Lock 8 with earth so as to correspond with the raised coping. I think this is proved both by the oral evidence and the condition of the old pawl which has been partly excavated and shows grooves on it below the surface of the ground. The object of this erection was to prevent flood water coming down this reach of the canal flowing over Lock 8 and into its chamber, or on down to the lower reaches of the canal. I conclude that it was made effectual for this purpose and that until the flood water at Lock 8 rose 15 inches over the level of the old coping this flood water was penned back in the reach of the canal above Lock 8. The defendants cannot complain of this erection save to the extent to which it injures them, which I will endeavour to ascertain later. In 1912 the defendants objected to this erection and called for its removal, and after a tedious correspondence the additional coping was removed in February, 1921, without prejudice to plaintiffs' rights. It was alleged

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by the defendants that the embankments at the back of the coping still remained, and that sod banks had been erected at each end of the lock to control the flow of water in time of flood. Nothing happened from 1921 till 18th January, 1924, when there evidently was a very heavy flood both in the river and the canal and all over this part of the country—on that day a number of the defendants' servants proceeded from their works along the towing path up to Lock 8, found an embankment along the mouth and sides of the lock which prevented the flood water getting away over Lock 8, and against the protests of the only employee of the plaintiffs present cut channels right along the length of the lock on both sides and let the water above the level of the old coping run along Lock 8 and into the lower reaches of the canal. The plaintiffs immediately restored the embankments and defendants again on 21st January, 1924, entered on Lock 8 and again removed them. The plaintiffs' and defendants' contentions are adequately stated in the plaintiffs' letters of 19th January, 1924, and 23rd January, 1924, and the defendants' letter of 25th January, 1924."

Mr. Matthews, who opened the appeal for the appellants, pointed out that the learned judge fell into error in using in this passage the words "about 15 inches" instead of the correct words "about 12 inches." In the letter dated January 25, 1924, Mr. Norman McMurray, one of the directors of the defendant company, admits and justifies the action of the servants of the company of which the appellants complain.

The learned judge then proceeds to point out that the first question to be decided in the action is whether the respondents were entitled to cut away the embankment down to the level of the old coping at Lock 8, as they had, in fact, done. As bearing upon this question he proceeds to analyze the several statutes already referred to and points out their application to the facts proved, the rights the provisions confer, and the obligations they impose. He deals with the difficulty of carrying out the system of inland navigation authorized by these statutes. He says the undertaking authorized by

the statutes was carried out by using the channel of the river where it was permanently navigable, and where it was not so navigable by cutting a canal leading out of the river and carrying it through a series of locks to a lower level where it again joined the river at a point at which it, the river, had become navigable, the necessary supply of water for the canal being obtained by erecting a weir of an ascertained height in the river, which necessarily retained and sent along the canal all the water below that height, and afforded to all the water above that height a free vent over the weir and away from the canal. The object of this arrangement obviously was to supply the artificial portion of the canal with sufficient water for the navigation of it, and to divert as far as possible the flood water from the canal so as to keep it navigable. These results, he says, were effected, or intended to be effected, as regards the portion of the canal leading to Lock 8, by the weir erected at the point marked on Map No. 2. The level of this latter weir was proved to be 60.5 O.D., while the level of the coping along the sides of Lock 8 was 62.7 O.D. or 62.8 O.D.

The learned judge says he could not believe that the engineers who constructed this reach of the canal ever anticipated that in flood times the water in the canal would ever rise beyond the height of 62.7 O.D. and flow along and over Lock 8 into the chamber of the lock, or down to the lower reaches of the canal, that this would turn the Lock 8 into a waterfall or cascade making it impossible to raise water in the chamber to the same height as in the canal above Lock 8, and in the result to make navigation of the canal impossible. He further says he does not accept the contention of the defendants that Lock 8 was constructed as a vent for flood water in addition to the vent over Weir I, and considers that it would be utterly inconsistent with the making of a navigable passage from Belfast to Lough Neagh that the towing path and one of the locks should in flood time be continuously submerged, and the earth at the back of the masonry along the sides of the chamber of the lock be washed constantly away.

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The learned judge then deals elaborately with all the evidence touching the effect of the culvert at the point marked F on Map 2, and also the effect of the weir at AI on the current and discharging power of the canal and of the river respectively, and sums up his conclusion on the evidence touching these and other points in controversy in the following passage of his judgment: (1) "It seems to me that having regard to the flood in the river on this occasion it is very difficult to say to what height the water at point F and in defendants' lands would have risen even if there had been no embankment at Lock 8. The onus of proving this was on the defendants and it has not been discharged. At the same time, I am of opinion that the additional embankment made when the coping at Lock 8 was raised prevented the water when it rose above 62.7 getting away over this lock as quickly as it would have done if there had been no embankment there, and that flood water must have been kept on defendants' premises somewhat longer than it would have been if no embankment existed. The defendants have not satisfied me on the evidence that the water from the canal would not have mixed with the spring water in Gilmores Moss even if no additional embankment above the height of the original coping had been made, but I am satisfied that the embankment had the effect of keeping water from the canal for a longer time and at a greater depth on defendants' lands than would have been the case if no additional embankment had been raised at Lock 8."

Were then, he asks, the defendants entitled to take the law into their own hands and remove this embankment which the plaintiffs made for the protection of Lock 8 and the navigation through their canal? He then points out that the plaintiffs own the property on both sides of Lock 8, that the lock house is theirs, and that under the express words of s. 5 of 6 & 7 Vict. c. civ., as being necessary for the purposes of navigation, the property in the towing path is theirs.

He adds: "The right of abatement of nuisance undoubtedly

(1) [1926] N. I, 22–24.

exists but it is not favoured by the law. The plaintiffs' property extends through many miles of country and is necessarily exposed and unguarded. Any interference with it may cause irreparable damage to a great public work. For this reason, as in the case of railways, provision is made making any person who wilfully breaks down or damages any works made for the use of the said navigation guilty of a criminal offence punishable by fine and possibly imprisonment, and the defendants broke down this embankment without giving any notice, and the embankment was made to protect Lock 8. Is any person, be he mill-owner, manager, farmer, labourer or other person, who conceives that he is injured by some work made by the plaintiffs for the use of this canal to be at liberty to break down the work and say I thought it was unauthorized, in the teeth of such a section ? "

Even if the defendants were owners of the land on the west side of the lock down to the edge of the lock chamber, they would, he thinks, hold it subject to the right of the plaintiffs under the statutes to use this land for the purpose of their undertaking, including the making, if otherwise legal, of the embankment complained of.

He justly points out that in reference to the field of the defendants' land marked " made liable to floods," it was proved that this field is flooded from the river before it is flooded from the canal, and that any flooding of it, therefore, from the canal was not proved to be caused by any act of the plaintiffs' works. The learned judge then states that in his view the defendants in doing what they did committed what was prima facie a criminal act under the statutes, and that on that ground alone the plaintiffs would be entitled to the injunction they claim.

He winds up his judgment by stating that, whether the act done by the defendants was a criminal act or not, he was of opinion that when the plaintiffs discovered, prior to 1912, that owing to an increased rainfall, or to more extensive drainage in the upper reaches and catchment area of the River Lagan, or to some other cause for which the plaintiffs were not responsible, flood water over the original level of

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the coping of the lock 62.7 would come along their reach of the canal, and would, if permitted to flow over the lock, have prevented the canal from being navigable, and destroyed the lock, the plaintiffs were entitled under their statutory powers to do the acts complained of to preserve and uphold their lock as portion of the navigable system from Belfast to Lough Neagh. He accordingly granted the plaintiffs the injunction they asked for, fixed the damages at 20*l.* and dismissed the counterclaim of the respondents with costs, on the ground that the respondents were not entitled to do the acts they committed.

I have read most carefully the evidence given in the case. There possibly may be a question as to whether the respondents were responsible criminally for the action they permitted themselves to take. It was, however, in my view illegal even if not criminal. I entirely concur with Wilson J. in all the conclusions to which, on the evidence, he has come, especially all his findings of fact. They are, I think, sound and reliable.

There was no evidence given before either of the Courts to show that the level of the water in the canal or in its lock should only reach a certain height. It was proved before Wilson J. that great flooding in Lock 8 and its chamber would impede navigation of the lock, and in my view it is perfectly clear that if the appellants erected clay banks on their own property along each side of this lock to protect their property from being flooded to the injury of the navigation of the lock and canal, it was within the right of the appellants to raise those embankments. Their erection would forward the main and paramount purpose and object of the cited statutes, the facilitation of the navigation of the canal. If the respondents have land near this lock, they must, I think, hold it subject to the main purpose of the statute of navigation.

I fail altogether to see what expedient other than the erection of these banks of clay the appellants could have resorted to in order to facilitate in time of any flood the navigation of the lock in the way described.

In the Court of Appeal this judgment of Wilson J. was

reversed. It was, it would appear to me, held by that Court that the principle laid down in the case of *Geddis* v. *Proprietors of Bann Reservoir* (1), and in *Bligh* v. *Rathangan River Drainage Board* (2), and several other authorities to the like effect applied to this case, and that the appellants had been guilty of negligence within the meaning of Lord Blackburn's judgment in the former of these two cases in the exercise of their statutory powers, with the result of thereby flooding the lands of the respondents. These cases establish, I think, this principle: that if a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third parties, or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them.

The facts of the case of *Geddis* v. *Proprietors of Bann Reservoir* (1) and of the Irish case which followed it are so entirely distinguishable from those of this case that the decisions are inapplicable to it. In the first the respondents had statutory powers to collect water into a large reservoir and discharge it therefrom from time to time as might be deemed necessary through the channel of a little stream, to be carried into the River Bann, but the persons incorporated under the Drainage Acts neglected to cleanse the channel of this little stream of the mud and silt accumulated in it by reason of the increased discharge of the water into it, with the result that, it being thus choked through this silt, it overflowed its banks, flooded the appellants' lands and injured them. In this case the Proprietors of the Bann Reservoir had clearly an option as to which of the two following methods they would choose for the exercise of the statutory powers they possessed—namely, the plan of cleansing and keeping free from silt the channel of the little stream into which they were empowered to discharge considerable quantities of water to be carried along that stream to the River Bann, or the method of discharging the same

(1) 3 App. Cas. 430. (2) [1898] 2 I. R. 205.

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body of water into the little stream without any periodical cleansing of its bed. They chose the latter, which caused the flooding.

The facts of the Irish case are almost identical in character with those of *Geddis* v. *Proprietors of Bann Reservoir* (1), and the same legal principles apply to it. The vital distinction between both these cases and the present case is that here the appellants had no option as to which of two possible courses they would select for the exercise of their statutory powers and the discharge of their statutory duties.

In my view, therefore, there was no evidence given in the case which, rightly considered, established that the appellants were guilty of negligence in the exercise of their statutory powers. They had either to erect these clay banks, as they were, prima facie, entitled to do, in order to protect their own lands from being flooded, and to secure that the navigation of the lock should not be interfered with or impeded, or to utterly disregard the obligations imposed upon them by the provisions of the statutes I have already referred to.

In my view, therefore, there was no evidence given at the trial to establish that the appellants in their dealing with the management and protection of Lock 8 and the erection of these clay banks had, as regards the respondents, done any wrongful act or been guilty of creating a nuisance on their property either near Lock 8 or elsewhere.

But assuming that the erection of these clay banks with the resultant flooding caused by them was a nuisance to the respondents, the question remains, were they entitled, without giving any notice of their intention, to enter upon the bank of the canal in the high-handed and aggressive manner in which they did, and cut two small drains or aqueducts on each side of the lock and do the other things described ?

It has been well said that the abatement of a nuisance is a remedy which the law does not favour and is not usually advisable, and that its exercise destroys any right of action in respect of the nuisance. In *Earl of Lonsdale* v. *Nelson* (2)

(1) 3 App. Cas. 430. (2) (1823) 2 B. & C. 302, 311.

Best J. said: "The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice." In the abatement of the nuisance unnecessary damage must not be done: *Colchester Corporation* v. *Brooke.* (1) In *Campbell Davys* v. *Lloyd* (2) Collins L.J. (as he then was), in delivering judgment, expressed himself in the following terms: "The right of abatement by individuals is not regarded with favour by the law. In the words of Lord Hale: 'But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice': see this cited in *Earl of Lonsdale* v. *Nelson*." (3) Lord Campbell in *Dimes* v. *Petley* (4) said: "If there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and, without considering whether he must shew that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." Again, where there are two ways of abating a nuisance, the less mischievous is to be followed, unless it would inflict some wrong on an innocent third party or the public, and previous notice is given when necessary. This proposition is supported by the following case of high authority decided in the Court of Exchequer: *Roberts* v. *Rose.* (5) Blackburn J. (as he then was), delivering the judgment of the Court, lays down some general

(1) (1845) 7 Q. B. 339.
(2) [1901] 2 Ch. 518, 524.
(3) 2 B. & C. 312.
(4) (1850) 15 Q. B. 276, 283.
(5) (1865) L. R. 1 Ex. 82, 89.

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propositions. He said: "We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrongdoer so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if, by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrongdoer himself might be justified." I have already shown, I hope successfully, that the appellants in building these clay banks along the sides of Lock 8 to protect their own land from floods and protect their canal, were not wrongdoers, and, according to the judgment of Wilson J., should not have been interfered with.

The respondents have, therefore, in my view, in acting in the high-handed and violent manner in which they have chosen to act, violated every principle laid down by the authorities I have cited touching the abatement of nuisances. The respondents gave no notice of their intended action. They have not proved that they did not do any unnecessary damage. They have not proved that there was not an alternative method other than the cutting of these banks to reduce successfully the flooding of their lands. They have, I think, altogether failed to justify the course they took. On the whole, therefore, I am of opinion that the order appealed from was wrong and should be reversed; that the decision of Wilson J. was right and should be affirmed; and that this appeal should be allowed with costs here and in the Irish Court of Appeal.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. The fundamental question at issue between these parties is whether the appellants, the Lagan Navigation Company, acted in breach of their duty towards the Lambeg Bleaching, Dyeing and Finishing Company, the owners of lands on both sides of the banks of the canal.

The duty cast upon the Navigation Company included not only the construction of the canal, but, by s. 62 of the Act 6 & 7 Vict. c. civ., "the said Company shall at all times during the continuance of this Act maintain and keep the said navigation and every part thereof and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing-paths, ... and all works to be hereafter executed for the improvement thereof in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively."

It is maintained by the respondents that the result of raising, in the year 1921, the level of the coping of the embankment and supporting it from behind by earthwork by the Navigation Company has been to flood their lands, and that ipso jure the Navigation Company are responsible in law for the damage so caused.

It is not suggested in the case that the raising of the coping was caused by anything of the nature of an alteration in the use or management of the canal, that is to say, any such alteration in the use or management thereof as would have involved a new constructional system. It may well be argued that even although this had been the case, yet the duty of the Navigation Company under the section which I have just quoted would have been the same as in the present case.

It is unnecessary, however, to make any pronouncement as to such a case, because the circumstances which brought about the raising of the coping arose because experience had shown that, on rare occasions, such floods had occurred as to demonstrate the necessity for the coping being raised for the protection of the canal. It is not denied that the effect of the flood if the coping was not raised, but was left as before, would be to expose the lock in such a manner that the overflowing water would cut away the back thereof and, if allowed to continue, would wash it away. Had, accordingly, measures not been taken by the raising of the coping to prevent such an overflow, and had the result been the breaking down of the damming works, there would apparently have occurred such a breach of duty upon the part of the Navigation

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Company as would have formed a good ground of action by any parties endamaged thereby.

But the foundation of the present complaint by the riparian owners is precisely to the opposite effect—namely, that the Lagan Navigation Company did not neglect to take, but did take, steps which were necessary to protect the canal and the navigation thereof in terms of the statute. The whole case as to their having improperly done that—so far as such protection was concerned—has disappeared, and what is left is the complaint—and that alone as urged at the Bar of the House—that a statutory duty rested upon the Navigation Company to construct not only works protective of their own property but also works protective of the property of their neighbours.

This raises in a bold form a question which I hold to have been long settled. The authorities are entered upon with fullness in the judgment of my noble and learned friend who has preceded me, and I therefore do not presume to re-enumerate them at length, and make my observations brief. This is a case of a common danger caused by an act of nature.

I refer to *Nield* v. *London and North Western Ry. Co.* (1), and especially to the judgment of Lord Bramwell, and to *Rex* v. *Commissioners of Sewers for Pagham* (2), and particularly to the judgment of Lord Tenterden C.J. (a case of a public authority executing works against inroads of the sea). In *Gerrard* v. *Crowe* (3) a riparian proprietor had protected his land from flooding overflow, with the result that there was an increase of overflow on an opposite proprietor's lands. The authorities are collected and analyzed by Lord Cave. "The general rule," says the Lord Chancellor, "as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson* v. *Farquharson* (4) the rule was stated as follows: 'It was found lawful for one to build a fence upon his own ground from the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage

(1) L. R. 10 Ex. 4.
(2) 8 B. & C. 355.
(3) [1921] 1 A. C. 395.
(4) (1741) Mor. 12779.

should happen to his neighbour by throwing the whole overflow in time of flood upon his ground.'" The Lord Chancellor uses the phrase as to protection against a "common enemy" which had been used in preceding cases.

If the above, so often repeated, be the law with regard to the duty of each riparian proprietor being bound to protect himself in a case where one has executed protective work upon his own property, it may well be argued that the present case is a fortiori one in which the same principle ought to be applied, seeing that the works protective of the navigation were here in the nature of a statutory requirement.

Upon decision, the avoidance of liability by authorities acting strictly in execution of statutory powers and without negligence is clear. The words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1) remain of the highest authority—namely: "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently."

In one view, it is not necessary in the present case to enter upon that inquiry. And for the following reason: up to this moment it is not suggested with any clearness or plainness what it is that the Lagan Navigation Company in supplement to and as a corollary of their statutory duties to protect the canal and navigation should have done. The case, as pleaded, made no such suggestion and was rested simply upon the footing that damage was caused to the defendants by reason of the plaintiffs having done what the statute required. In my view, when the action of a party has conformed to a statutory obligation, it would require a case of great precision of statement upon the part of the adjoining owner to set out what works additional to those needful under the statute were also impliedly to

(1) 3 App. Cas. 430, 455.

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be undertaken. There was no such statement or pleading before Wilson J.

That learned judge, however, acted, in my view, in the interests of both parties and with great propriety in getting a report under the terms of which both parties could come together in their mutual interest, so as to avoid a common danger. The report suggested certain things to be done, including the acquisition of other property in order that works of a relatively small but safeguarding kind should be executed on lands other than those now possessed by the Navigation Company.

It was objected in the Court of Appeal that this was not evidence in the cause, and that objection, which was repeated at their Lordships' Bar, is technically sound; but the odd thing is that in the Court of Appeal in Ireland one of the judges suggested, at his own hand, another scheme of the nature of lateral escape by a grid-work arrangement, while in this House the counsel for the appellants proposed a scheme, neither sanctioned by the report nor suggested in the Court below, to the effect that the Navigation Company should do effectively and lawfully something of the nature of the very thing which had, high-handedly and ineffectively, been done by the respondents themselves. I think this manner of handling rights in law should not be sanctioned, and it confirms me in the view of the need for a precise conception being formed and stated of the scheme of protective works which is alleged to be supplementary to and arising out of statutory obligations.

In deciding this case, and noting the absence during the whole course of the proceedings of any feasible suggestion of such a scheme of protective works, I further do not conceal from myself that enough has been shown in the case to indicate that if the parties meet together in a reasonable spirit, they can achieve protection all round, both for the canal and the riparian interests. In my view, the appeal should be allowed and the judgments pronounced in both cases by Wilson J. should be reverted to.

I agree entirely in condemning the unauthorized and high handed proceedings of the respondents in committing a trespass upon the appellants' property and attempting at their own hands, and against the will of the appellants, to provide a remedy by violent entry and operations upon that property.

LORD WRENBURY, in arriving at the same conclusion, based his judgment entirely on the facts, and decided that the flooding of the respondents' premises was caused not by the appellants, but by works which the respondents had constructed for their own convenience on their own land.

LORD CARSON: My Lords, I concur.

LORD ATKINSON: My Lords, I have been requested by my noble and learned friend, Lord Dunedin, to say that he concurs in the judgments just delivered.

Order of the Court of Appeal in Northern Ireland reversed and judgment of Wilson J. restored. The respondents to pay the costs in the Court of Appeal in Northern Ireland and also the costs of the appeal to this House. Cause remitted to the Chancery Division of the High Court of Justice in Northern Ireland to do therein as shall be just and consistent with this judgment.

Lords' Journals, Nov. 25, 1926.

Solicitors for the appellants: *H. H. Wells & Sons, for White, M'Millan & Wheeler, Belfast.*

Solicitors for the respondents: *Blyth, Dutton, Hartley & Blyth, for Robert Wallace, Belfast.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 Nov. 26.

MORRIS . . . . . APPELLANT;

AND

HARRIS (PAUPER) . . . . . RESPONDENT.

Distinguished. TYMAN'S LD. v. CRAVEN [1952] 1 Q.B. 100

Distinguished. TYMAN'S LD. v. CRAVEN [1952] 2 Q.B. 100

Company—Winding Up—Dissolution—Order avoiding Dissolution—Validity of Acts done in the Interval—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 223.

An order of the Court made under s. 223 of the Companies (Consolidation) Act, 1908, declaring the dissolution of a company to have been void does not affect the validity of proceedings taken during the interval between the dissolution and its avoidance :—

So *held* by Viscount Dunedin, Lord Sumner and Lord Blanesburgh (Lord Shaw of Dunfermline and Lord Wrenbury dissenting).

THE appellant was the liquidator of Morris Russell & Co., Ld., which went into voluntary liquidation on November 21, 1919, for the purposes of reconstruction. The respondent claimed to prove as a creditor of the company in the winding up.

This was an appeal from an order of the Court of Appeal (Pollock M.R., Sargant L.J. and Astbury J.), reversing an order of Romer J. and admitting the respondent's proof.

The facts sufficiently appear from the opinion of Lord Sumner.

The only question of general legal interest raised by the appeal was as to the effect of an order of the Court under s. 223 of the Companies (Consolidation) Act, 1908 (1), avoiding the dissolution of the company upon acts done during the interval between the dissolution and the order of avoidance.

* *Present :* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD WRENBURY, and LORD BLANESBURGH.

(1) Sect. 223, sub-s. 1 : "Where a company has been dissolved the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

1926. July 5, 6. *Preston K.C.* and *Croom-Johnson* for the appellant.

Topham K.C. and *A. R. Taylour* for the respondent.

The House took time for consideration.

1926. Nov. 26. VISCOUNT DUNEDIN. My Lords, in this case I have had the advantage of perusing the opinion which will be shortly delivered by Lord Sumner. I agree with that opinion in every particular and have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, the opinion about to be read by my noble and learned friend Lord Wrenbury so clearly and distinctly expresses the opinion which, after consideration and reconsideration, I have formed upon this case, that I respectfully and entirely adopt it, and I agree with the course which Lord Wrenbury recommends.

LORD SUMNER. My Lords, in 1917 the respondent was engaged as a commercial traveller by three companies, Morris Russell & Co., Ld., Atkey (London), Ld., and another not now material. These businesses and his duties were separate, but the companies engaged him under a written agreement jointly and severally. Next year they dispensed with his services, whereupon he claimed damages for wrongful dismissal. Atkey (London), Ld., ultimately went into liquidation, and the respondent in October, 1921, came to an agreement with the liquidator that he should be placed on the list of creditors in the liquidation for 1075*l.*, but so far nothing has been paid to him.

His claim against Morris Russell & Co., Ld. (called for convenience " the old company "), he pressed further. Accordingly, in August, 1919, the old company claimed arbitration under the agreement, and eventually Sir Walter Schwabe K.C. was appointed arbitrator, and held a first meeting on December 19, 1919. For the purposes of this arbitration the old company had specially retained an eminent firm of commercial solicitors, who did not regularly act for them, and when the respondent's solicitor stated that he heard the

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old company had gone into liquidation and that another company, Morris Russell & Co. (1919), whom I shall call "the new company," had agreed to acquire their assets, and that he wished to know what the position in the arbitration really was, counsel instructed on the other side could only say generally, that he did not exactly know how that might be, but there was no desire to take any technical points and that, if the respondent's claim was established, the new company would discharge it. This was the substance of what passed on this occasion. It was then arranged that the firm instructing him should write a letter to this effect, and this letter was written on December 30, concluding thus, " our clients have instructed us to give you a formal assurance, that they are prepared to accept responsibility for any sum awarded to your client either as against the old company or the new company."

Thereafter meetings in the arbitration were held from time to time and, after delays the cause of which does not now matter, an award was made in favour of the respondent for 5964*l.* 16*s.* 8*d.* and costs—taxed at 2121*l.* 5*s.* 2*d.*—on June 6, 1921. No change having been made in the parties, who were formally before the arbitrator, the award was naturally against the old company.

The old company had, however, already been dissolved. The winding-up resolutions had been duly passed in November, 1919. The only object of the reconstruction was to facilitate the raising of fresh capital, and accordingly, the new company having been incorporated and having agreed to take over the old company's assets and to make provision for its liabilities on terms agreed in writing, the liquidator, the present appellant, duly prepared the final balance sheet, and on December 1, 1920, held the final meeting requisite for the conclusion of the winding up. He lodged with the Registrar of Companies the necessary documents, and they appeared in the Gazette in due course. In March, 1921, the old company was formally dissolved, pursuant to s. 195.

Meantime the business went on without change. It was carried on as a going concern throughout. The old board

became the new board, with the addition of one director, and it did not occur to any one that any real change had occurred. The liquidator, acting in perfect good faith, left all current business to the directors, and, though aware of the arbitration, took no part in it and gave no instructions. If the reconstruction had been successful, no one would have been one penny the worse.

Unfortunately, the new company got into difficulties, and on May 31, 1921, proposed a scheme of arrangement to its creditors. A meeting of creditors was held on June 15, 1921, at which the respondent attended. He inquired about his claims, but did not vote. Eventually the scheme was approved, and became binding on the unsecured creditors of the new company. Then, some six months later, the respondent claimed to be a secured creditor of the old company, entitled to priority against certain of the new company's assets. Next, he took proceedings to enforce his award, which were dismissed on the ground that the award was against a company which had been dissolved. Afterwards, he issued a writ against the liquidator of the old company, with a personal claim against him for negligence and misfeasance as liquidator, and it was dismissed. Meantime, on February 20, 1923, Astbury J. made an order, declaring the dissolution of the old company to be void under s. 223, and the respondent claimed to be admitted to prove in its liquidation. The liquidator rejected this proof and his decision was affirmed by Romer J. This judgment was reversed by the Court of Appeal. Hence the present appeal is brought to your Lordships.

I agree that the respondent has failed in proving, as he undertook to prove, that "the old company" was, by a tripartite agreement, released from its liability to him, in consideration of the agreement of the "new company" to be bound to him to the same extent as the old company had been bound before.

This is not a case, in which an inference has to be drawn from the conduct of the parties simply, without any special interview at which a specific agreement can be deemed to

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have been made. If that were all, the dissolution of the old company, coupled with the conduct of Mr. Harris at the meeting of the creditors of the new company, after it had got into difficulties, might with other similar circumstances have gone some distance to justify the inference of a novation. As the case stands, however, a particular interview on a definite date is vouched as the occasion on which the alleged novation was agreed upon, in the presence of a number of persons, all or nearly all of whom were called as witnesses in the action. After carefully considering the notes of their evidence, I think it is clear that they fall short of proving the novation required. Even Mr. Cornwall, whose credit and intelligence are of course unimpeached, does not go far enough. If the circumstances then existing had been such as to raise in the mind of any one present any anticipation of the misfortunes that afterwards befell the new company, the advisability of a novation in the interest of the old company might have suggested itself on the one side, but its unwisdom would equally have presented itself on the other. In fact, no one thought of it, or of the materiality, except for formal purposes, of considering the difference between the two companies at all. With every respect to Romer J. I think that he has rather considered what contract the old company ought to have made, if its liquidator had been more prescient, than what contract was made in fact.

When the new company "assumed" liability for the obligations of the old one to Mr. Harris, that liability was in terms and, so far as it went, was in fact a cumulative, not a substitutional liability. I do not think it is correct to say that in that case it was nudum pactum. If consideration had to be proved, I think it could be found in the consent of Mr. Harris to go on with the arbitration proceedings in their existing form instead of stickling for correctness by discontinuing the existing proceedings and putting himself and his de facto opponents to the trouble and expense of beginning the arbitration afresh. As to the supposed advantage to the new company of being able after a novation to dispose freely of the old company's assets, earmarked for the

satisfaction of Mr. Harris's claim, there is no evidence to show that it was of any practical moment, and I do not think it was ever considered.

The next question turns on the language and effect of s. 223 of the Companies (Consolidation) Act, 1908. It deals with the case of a company which has been dissolved, and that at an ascertained or ascertainable date. It provides for an order, which it empowers a Court to make in all such cases, on such terms as the Court may think fit (and therefore also without terms, if the Court so thinks fit) "declaring the dissolution to have been void." Pausing here, I remark that the order is not expressed to be one setting anything aside or declaring that the dissolution is to be deemed not to have taken place and thus reversing the actual language of s. 195, or declaring the dissolution to be void. Nor, again, is the phraseology of s. 242 followed, whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, ending in the erasure of the company's name from the register and a publication of the fact in the Gazette, the company thereupon "shall be dissolved." Under this section, when the Court intervenes by order to modify this result, "the company shall be deemed to have continued in existence, as if its name had not been struck off," and then the Court can give directions to replace the company and all parties affected in an "as you were" position. The words "to have been void," in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, "and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved," seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do,

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" thereupon " and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution. I think these words do not affect the validity or the contrary of steps taken during that interval. They must still depend on the facts existing and the rights arising before and independently of the order.

It is to be remembered what the scheme of the Act is. The statutory dissolution does not take place till three months have passed from the time when the registrar has registered a return, made to him by the liquidator and stating that, having brought the liquidation to an end, he has embodied the results in a final winding-up account, which he has submitted to a general meeting. If the liquidator here had attended to matters himself, instead of " delegating " them, as he calls it, to the directors of the new company, no doubt the winding up would have been complete, as the Act intended it to be, and proper provision of some kind would have been made for Mr. Harris's claim. Accordingly, the last three months of the life of the old company would have been, as they ought to have been under the statute, a period during which the company, stripped of its property and discharged from its debts, would have simply awaited dissolution. In case, however, of accidents there is a provision in s. 194, sub-s. 4, that the Court may make an order deferring the date at which the dissolution is to take effect.

My Lords, I think it follows that only in the rarest cases and always contrary to the contemplation of the Act is it possible for proceedings to have continued in fact during these three months when the company is moribund, and further that after dissolution, which is an event calculable by anybody from a date, of which public notice has been given, whatever is done is done at the actor's peril. The Legislature would never have bestowed on the Court a power to declare the dissolution void, without imposing terms, as by the section it certainly is empowered to do, if the effect of this order of avoidance might be to undo the reversion of freeholds to an original grantor or the acceleration of a

reversioner's immediate title to leaseholds in the case of lands accidentally undisposed of in the winding up (Co. Litt. 136; *Hastings Corporation* v. *Letton* (1); *In re Woking Urban Council* (*Basingstoke Canal*) *Act*, 1911 (2); *In re Albert Road, Norwood* (3)); yet such would be the effect of the construction contended for, with a consequent avoidance of all dispositions made by such grantor or reversioner in favour of third parties, wholly innocent of any irregularity. This must be the result, if the judge's order simply puts back the clock and restores things, as though the dissolution had never been. Accordingly, I see no reason why the Legislature should be deemed to have had in its contemplation any intermediate proceedings. They must in any case be so rare and exceptional, that they might well either be passed over unconsidered or, if considered, be left by the Act to the ordinary operation of the law. The object of the provision was, I think, to give a fresh start to proceedings, which owing to the dissolution had been impossible and had not been taken, and thereupon it was to be open to those concerned to take them in the future as if the dissolution had not happened. In my opinion most of the proceedings in the arbitration in this case, and, above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them. The respondent must therefore prove his claim afresh in proceedings, to which the appellant will be a party.

As to the Atkey (London), Ld., claim, I think on the facts that there was an accord between the respondent and Atkey, Ld., who were joint and several debtors with the old company, and that the accord is effectual to bind the respondent in so far as it agrees to qualify and limit his claim, but I do not think that the accord has been followed by any satisfaction. The fact that under the accord his name was to be placed on the list of the admitted creditors of Atkey, Ld., is not a satisfaction, unless and until it is followed by some

(1) [1908] 1 K. B. 378. (2) [1914] 1 Ch. 300.
(3) [1916] 1 Ch. 289.

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payment of the agreed debt, and then only to the extent of any sums paid in respect of it. Accordingly the respondent will be entitled as against the liquidator to prove for such amount, not exceeding 1075*l.* in all, as may still be due from and unpaid by Atkey, Ld., as well as for such sums as he can prove in respect of his direct claim on the old company.

LORD WRENBURY. My Lords, the appellant, the liquidator of the old company, contends that on December 19, 1919, before the arbitrator there was a novation, whereby the old company was released from liability to the respondent and the liability of the new company was given and taken in substitution. The facts relevant to the decision of this question lie in a small compass. We have been referred to a number of letters which passed between the parties. I do not find it necessary upon this point to refer to any of them. The relevant facts are simply as follows. There were before the arbitrator as represented by counsel all three parties if and only if the old company was there. Upon this part of the case, therefore, it must be part of the appellant's case that the old company was there by solicitors and counsel representing it. I must presently say something as to whether this was so in fact, but for the moment I will in favour of the appellant assume that it was so. If it was not then there could be no novation, for upon that hypothesis the old company was not present. As to the other two parties, the one—namely, Mr. Harris—was present by counsel, and the new company was also present if, as I have no doubt was the fact, Messrs. Coward & Co. represented it and were there as representing it.

The old company was in liquidation—the new company had been formed—the directors were the same as before, and, as it was expressed by the witnesses, there had been no break in the business. It is clear, I think, that the parties, under these circumstances, largely ignored the fact that the old company and the new company were in law distinct entities. They were indifferent whether the one or the other paid or remained or became liable to pay the debt. But that by

no means decides the question of novation. The parties contractually bound by the arbitration clause were Mr. Harris and the old company. The new company was not bound by it. The arbitration, which all parties were treating as valid, whether it was, in fact, valid or not (a question upon which again I will say something presently), was between Mr. Harris and the old company. The new company was not a party to the arbitration clause and was not a party over whom the arbitrator had jurisdiction. Under these circumstances the arbitrator, who was called as a witness, says (reading his note): "Somebody representing Harris—Bartley, I think—called attention to fact that respondent company was in voluntary liquidation for reconstruction and asked how he stood. Discussion ensued between Cornwall of Coward & Hawksley and Jowitt and statement was made to Bartley in my presence coming from respondents to arbitrate—You needn't trouble—You can treat them all as one—and if you get anything on your arbitration—new company will see you are paid—No question of releasing the old company or novation otherwise I should not have gone on in the absence of new company."

Mr. Jowitt was counsel, instructed by Messrs. Coward & Co. That firm was acting also for the new company. Cornwall was managing clerk of Messrs. Coward. The situation as indicated by the arbitrator is so obviously correctly stated that it is, in my opinion, impossible to do otherwise than accept it. The new company was no party to the arbitration. If there was novation it would be impossible to go on unless the new company was brought under the arbitrator's jurisdiction as a party who by novation had become liable in place of the old company who had been released. Nothing was done to bring them there. "There was no question," says the arbitrator, "of releasing the old company or novation otherwise I should not have gone on in the absence of new company." Absence here means, of course, absence as a party over whom he had jurisdiction. There may have been presence in fact if, as I have no doubt, Messrs. Coward who were there represented them.

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My Lords, upon these facts there was, in my opinion, no novation.

For decision of the rest of the case three questions have to be considered: First, was the arbitration duly instituted? The facts are as follows. By letter of August 13, 1919, the old company, writing to Mr. Harris, gave notice to arbitrate, and requested Mr. Harris to appoint an arbitrator. They asked him to prepare his case for arbitration. Some negotiations seem to have taken place, but they came to nothing, and on December 1, 1919, Messrs. Gedge & Co., for Mr. Harris, addressed a letter to Messrs. Coward & Co., in which they said they understood that the latter were acting for the old company, and referring to arbitration as necessary suggested the appointment of a sole arbitrator. On December 2 Messrs. Coward replied asking Messrs. Gedge to send the names of several King's Counsel and they would take their client's instructions in the matter. On December 3 Messrs. Gedge sent names. On December 4 Messrs. Coward replied. Other letters passed on December 8 and 9, and in the result Mr. Schwabe was agreed upon as arbitrator, and it was agreed that the parties should be represented by junior counsel only. In the course of this correspondence the subject cropped up of the old company being in liquidation and of the registration of the new company. On December 1 Gedge & Co. wrote that the old company was the party to the contract which contained the arbitration clause, and asking: "Do you suggest that it is the new company—namely, Morris Russell, 1919, Ld.—who would be parties to the arbitration?" On December 11 Messrs. Coward replied: "It would be more convenient if the new company were made parties to the arbitration. However, if you prefer otherwise it does not in the least matter." There the matter rested. The new company were not made parties to the arbitration, and in that state of things the preliminary meeting before the arbitrator took place on December 19.

Upon these facts it seems to me that the old company by Messrs. Coward & Co. were before the arbitrator on December 19 as the party to the arbitration, and that the

new company (although present as parties interested) were not before the arbitrator as parties to the arbitration. The liquidator says he was not consulted in the matter. The fact, however, seems to have been that the directors of the old company and of the new company being the same the liquidator left in the hands of the directors the conduct of this matter. I hold that there was an arbitration duly constituted between Mr. Harris and the old company, and that to this arbitration the new company were not parties.

Secondly. The following point arises. The arbitration was postponed from 1919, and was not, in fact, held until after March 3, 1921. The award was made on June 6, 1921. In the interval between 1919 and 1921 the liquidator had in December, 1920, made his final return under s. 195 of the Companies (Consolidation) Act, 1908. It had been registered, and by virtue of s. 195, sub-s. 4, the old company on March 3, 1921, was "deemed to be dissolved." However, on February 20, 1923, Astbury J. made, under s. 223 of the Act, an order declaring the dissolution "to have been void." The award, therefore, was made at a time when the company was to be "deemed to be dissolved," but this dissolution was by subsequent order declared "to have been void." It is not necessary to consider what would have been the result of these provisions of the Act if during what I may call the suspense period acts had been done which affected third parties. The whole question here is whether the liquidator who, in fact, was a party to the arbitration in 1921, can say that the arbitration does not bind him, and that (looking at the last words of s. 223) such proceedings cannot be taken to enforce the award as might have been taken if the company had not been dissolved. In my opinion he cannot support that contention. The order made under s. 223 declaring the dissolution "to have been void" operates to displace the state of facts in June, 1921, as they would have been in the absence of that order, and substitutes a state of facts in which there was in June, 1921, no dissolution. The result, in my judgment, is that at the date of the award it must be taken

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that the dissolution, although then existing, was then a void dissolution and the award was good, and such proceedings can be taken upon it as might have been taken if the company had not been dissolved.

Thirdly. A further point arises as to a sum of 1075*l.*, which on October 5, 1921, was agreed as being in settlement of a claim by Mr. Harris in respect of which he was to be placed on the list of creditors of Atkey (London), Ld., which was then in liquidation. This was a sum due under the agreement of September 26, 1917, in respect of which the three companies, of which the old company was one, were jointly and severally liable. The agreement of October 5, 1921, was not, I think, accord and satisfaction of this debt. It remains a debt in respect of which the old company was severally liable, and the amount of their liability remains yet to be ascertained.

The result, therefore, is that the order of the Court of Appeal reversing the order of Romer J. should be affirmed, and that a proof should be admitted for the amount of the award, and that as regards the 1075*l.* a proof should be admitted for such sum as Mr. Harris can establish, but not exceeding 1075*l.*

LORD BLANESBURGH (read by VISCOUNT DUNEDIN). My Lords, left to myself, I confess that, with the learned judge, Romer J., I would in this case have reached the conclusion, despite all technical difficulties obstructing the road to it, that there was here effected on December 19, 1919, an arrangement, indorsed by Messrs. Coward's letter of December 30, 1919, under which the new company assumed direct but sole liability to the respondent for the consequences of his dismissal by the old company. That assumption of liability involved a condition of the first importance to the new company, though of little or no moment, as it then seemed, to the respondent—namely, that the liability to him of the old company should *eo instanti* disappear. In the case of every other creditor of the old company, including even its bankers after some little delay, this assumption of liability,

on these terms, was effected by express novation. Left to myself, I should have reached the conclusion that, though less formally, the same result was both intended and achieved in relation to the respondent's claim. That result was alone of any value to the new company, its purpose from beginning to end being that as the sequel of its assumption of direct and sole liability for the debts of the old company, an immediate transfer to itself of the entire undertaking of that company might be made possible, the continuance of the business without break and with increased resources be facilitated, the liquidation of the old company, thus reduced almost to a formality, be brought to a speedy close, the way to the dissolution of that company be opened, and the opportunity afforded to the new company of assuming—I had almost said resuming—the old company's name be presented to it at the earliest moment. And it appeared to me, no suggestion of fraud or sharp practice being either open or made, that except on that footing no reasonable explanation was forthcoming either of the complete aloofness of the liquidator of the old company from the arbitration proceedings or of the old company's dissolution carried out as that dissolution was with the new company's knowledge and before these proceedings even reached a hearing.

And left to myself, my Lords, I should have reached the conclusion that the respondent, too, appreciated and accepted the condition. Of the view of the Court of Appeal that the assumption by the new company of a liability additional to the existing liability of the old was all that had taken place, nothing confirmatory is, almost admittedly, to be found in the actions either of the new company or the liquidator; nothing as I thought in those of the respondent. For, inconsistent as has been his attitude at different times in this matter, he has at no time, as it seemed to me, treated his rights as being those declared by the Court of Appeal. While his conduct up to the change of solicitors on or about December 31, 1921, indicates no trace of any claim reserved against the old company, his invariable course since that date has been to ignore the existence or attitude of the new

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company altogether. He did not even bring into account, in reduction of his claim for damages against the liquidator personally, either the 25 per cent. of that total claim which the new company had ready for him in cash or the amount of any value attributable to the balance of debentures which were his for asking.

My Lords, I had prepared a reasoned and detailed statement on the above lines, when I became aware that your Lordships were all resolved that the old company had not, by reason of anything that happened on October 19, 1919, been released from liability to the respondent. I bow readily to so strong an intimation of judicial opinion upon an equivocal question on which one cannot but be distrustful of one's own views made more difficult as they are by technical considerations. Accordingly, my Lords, I do not trouble your Lordships further on this branch of the case. I do not resist the decision upon it intimated by all your Lordships who have preceded me.

Thereupon at once arises the second question—one which did not receive in the Court of Appeal the consideration devoted to it in your Lordships' House. The respondent is entitled to prove in the revived liquidation of the old company for any damages for breach of his contract with that company that he can establish. But is the liquidator, as the Court of Appeal has held, bound to admit his proof for the sum awarded by Sir Walter Schwabe ? In other words, is that award binding in any sense upon the old company or its liquidator ?

My Lords, on this subject I find myself in entire agreement with my noble and learned friend Lord Sumner, whose judgment I have had the advantage of seeing in print.

The whole question turns upon the effect of Astbury J.'s order of February 20, 1923, under which, in terms unqualified in every relevant sense, he declared the dissolution of the old company " to have been void." That order was made in pursuance of power conferred upon the learned judge by s. 223 of the Companies (Consolidation) Act, 1908, and this present question depends entirely upon the effect, under that section, of such an order.

My Lords, the Companies (Consolidation) Act, 1908, makes the dissolution of one of its companies possible in three different events.

First of all, a company treated as defunct by the registrar in the circumstance stated in s. 242, may by him be struck off the register under that section, "and the company will be dissolved." It must be noted that in this case the dissolution takes place without any previous winding up and may be effected without any one interested in the company in fact being aware of it. Sub-s. 6 of s. 242 accordingly provides: "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on the application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, *and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*"

My Lords, this section first appeared in company legislation in s. 26 of the Companies Act, 1900. It was before the Legislature when s. 223 was first enacted in 1907. It will appear in a moment how significant is the fact that the provisions of s. 242, sub-s. 6, which I have italicized, are not repeated in s. 223.

That section is concerned with a dissolution of a company following a winding up by the Court or one following a voluntary winding up the second and third of the events which may precede a dissolution. Sect. 172 regulates dissolution complementary to a compulsory liquidation. When the affairs of the company have been completely wound up the Court is to make an order that the company be dissolved from the date of the order, "and the company shall be dissolved accordingly." Sect. 195 regulates dissolution succeeding a

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voluntary winding up. The liquidator, as soon as the affairs of the company are fully wound up, convenes by advertisement a final meeting of the company and lays before it an account of the winding up. Within a week after the meeting the liquidator must make a return to the registrar of the holding of the meeting and its date; on receipt the registrar must forthwith register the return, and on the expiration of three months from that registration "the company shall be deemed to be dissolved." Sect. 223, which, as I have already indicated, did not appear in company legislation until the Act of 1907, applies equally but exclusively to a company which has been "dissolved accordingly" under s. 172, and to a company which has been "deemed to be dissolved" under s. 195, and an order under that section may be made at any time "within two years of the date of the dissolution."

In these circumstances, I cannot myself doubt that both the words of s. 223 empowering the Court to make an order "declaring the dissolution to have been void," and the following words expository of the result, "and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved," were in each case designedly chosen to produce the precise result which my noble and learned friend has attributed to them. It is true that a declaratory order under the section unqualified in terms does, and it was in my judgment essential, if many difficulties which readily occur to the mind were to be avoided, that such an order should have the effect of restoring to the revived company its corporate existence as from the very moment of the dissolution thereby declared "to have been void." But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made—it is "thereupon" but not before—that any active consequences are to ensue.

I think, my Lords, that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that an order under the section made, it may be, as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to ratify acts done during the interval, which, if done at all, must necessarily have been acts of mere usurpation, by a liquidator or other pretended agent with no office knowingly done on behalf of a company which had no existence. On consideration, it appears, I think, clear that automatically to validate such acts as being the acts of a duly constituted officer on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged. These are avoided by the terms of the section. The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity.

And now is made apparent the reason for the difference in phraseology and effect between s. 223 and sub-s. 6 of s. 242. A dissolution under s. 242, as I have said, is preceded by no winding up, and the section had to envisage a dissolution which might have taken place without the knowledge of any one concerned in the company. Hence the wide powers given to the Court by sub-s. 6. Sect. 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The Legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved.

In my judgment, accordingly, the arbitration proceedings which abated on the dissolution of the old company thereby became abortive and have in no sense been reconstituted as a result of Astbury J.'s order. In my opinion the result is

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that expounded by my noble and learned friend, with whom also I am in entire accord as to the respondent's claim against Atkey, Ld.

He is entitled to prove in the liquidation of this company for such amount, not exceeding 1075*l.* in all, as he can show to be still due from and unpaid by Atkey, Ld. That right, with the further right to prove for such sum as he can show to be payable to him in respect of his direct claim against the company is, in my judgment, the measure of his rights in this liquidation.

Order of the Court of Appeal varied by omitting para. 2 of the said order and, subject to the said variation, affirmed. Cause remitted back to the Chancery Division of the High Court, Companies (Winding-up), with a direction that the respondent was entitled to prove in the liquidation of Morris Russell & Co., Ld., referred to in the case as "the old company," for such sums as he can establish: (1.) *for damages for breach by them of the contract of service and/or for commission and profits, and* (2.) *for his claim against Atkey (London), Ld., not exceeding the sum of one thousand and seventy-five pounds* (1075*l.*). *The costs of the appellant and respondent respectively, incurred in respect of the appeal to this House to be taxed as between solicitor and client, the costs of the respondent to be taxed in the manner usual when the respondent defends his interest in the appeal in forma pauperis.*

Lords' Journals, Nov. 26, 1926.

Solicitors for the appellant: *Goodman, Saunders, Squires & Co.*

Solicitors for the respondent: *Arnold, Fooks, Chadwick & Co.*

[HOUSE OF LORDS.]

OCEAN COAL COMPANY, LIMITED . . APPELLANTS ; H. L. (E.)*

AND

DAVIES . . . . . RESPONDENT.

1926
Dec. 3.

Workmen's Compensation—Restrictions on ending or diminishing weekly Payments—Cesser of Incapacity—Termination of Employer's Liability—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1 ; *First Sch., para.* 1 (*b*)—*Workmen's Compensation Act*, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 14.

By s. 14 of the Workmen's Compensation Act, 1923, "an employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act," subject to certain exceptions which did not apply.

On October 17, 1923, a workman contracted miners' nystagmus in the course of his employment, and by voluntary agreement the employers paid him a weekly sum by way of compensation until September 3, 1925, when they stopped the weekly payments on the ground that the man had completely recovered. After the employers had commenced arbitration proceedings for a review the workman admitted that the incapacity had ceased on September 3, but claimed compensation up to the date of the award :—

Held (by Lord Atkinson, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Carson ; Viscount Dunedin dissenting), that the arbitrator had no jurisdiction under s. 14 of the Act of 1923 to award any payment after the incapacity had ceased, and that he ought to make a retrospective award terminating the weekly payments as from the date of recovery.

Gibson & Co. v. *Wishart* [1915] A. C. 18 is not affected by s. 14 of the Act of 1923.

Davies v. *Glyncorrwg Colliery Co.* [1925] 2 K. B. 339 overruled.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an award of the county court judge of Glamorganshire in an arbitration under the Workmen's Compensation Acts, 1906 to 1923. On October 17, 1923, the respondent, whilst in the employment of the appellants, contracted miners' nystagmus. The appellants admitted liability, and under an oral agreement paid the respondent full compensation at the rate of 1*l.* 15*s.* per week from October 17, 1923, to November 26, 1924, when the compensation was reduced

* *Present :* VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

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by agreement to 1*l.* per week. On September 3, 1925, the appellants stopped the weekly payment, and on September 21, 1925, served on the respondent a request for arbitration, asking for the termination of the weekly payment as from September 3, on the ground that the respondent had on that date recovered from the nystagmus and had ceased to be incapacitated from performing his ordinary work at his ordinary rate of wages. Before the hearing of the arbitration the respondent admitted that he had recovered from the nystagmus, but claimed that by virtue of s. 14 of the Act of 1923 the weekly payments could not be terminated until an award had been made under the Act.

On October 27, 1925, the county court judge made his award, and held, on the authority of *Davies* v. *Glyncorrwg Colliery Co.* (1), that the respondent was entitled to compensation up to the date of the award.

The Court of Appeal (Bankes and Atkin L.JJ. ; Scrutton L.J. doubting) upheld the award.

1926. Nov. 5, 8. *E. W. Cave K.C.* and *Shakespeare* for the appellants. The Workmen's Compensation Act, 1906, provides that the amount of compensation, where total or partial incapacity results from the injury, is to be a weekly payment during the incapacity, and the jurisdiction to award weekly payments is limited to the period of incapacity. Although s. 14 of the Workmen's Compensation Act, 1923, provides that an employer shall not be entitled to end a weekly payment otherwise than in pursuance of an agreement or arbitration it does not limit the arbitrator's jurisdiction to make a retrospective award ending the weekly payments as and from the date when the workman has wholly recovered from his incapacity. *Gibson & Co.* v. *Wishart* (2) is not affected by s. 14. *Davies* v. *Glyncorrwg Colliery Co.* (1) is erroneous and ought to be overruled.

Montgomery K.C. (with him *Lincoln Reed*) for the respondent. Sect. 14 of the Act of 1923 was intended to give the workman

(1) [1925] 2 K. B. 339. (2) [1915] A. C. 18.

a new right and imposed a new liability on the employer for the benefit of the workman. If the appellants' contention is upheld the workman will be deprived of all benefit under the section. "In pursuance of" means subsequent to and in accordance with, and that implies that the arbitration is concluded. Under the Act of 1906 three different dates were suggested for the termination of the employer's liability: the date of recovery as finally ascertained, the date of the initiation of the arbitration proceedings, and the date of the award. The first date was that adopted by this House in *Gibson & Co.* v. *Wishart* (1), following the English practice. The third date was that originally adopted by the Scottish Courts, but subsequently the second date was adopted: *Donaldson Brothers* v. *Cowan.* (2) The purpose of s. 14 of the Act of 1923 was to displace the English view of the principal Act and to restore the view originally adopted in Scotland, and as a result both *Gibson & Co.* v. *Wishart* (1) and *Donaldson Brothers* v. *Cowan* (2) are abrogated. If this appeal is allowed it involves overruling one English case (*Davies* v. *Glyncorrwg Colliery Co.* (3)) and two Scottish cases (*O'Hare* v. *Bent Colliery Co.* (4) and *Lindsay* v. *Glasgow Iron and Steel Co.* (5)), and no practical effect is given to the prohibitory words of the section.

E. W. Cave K.C. replied.

The House took time for consideration.

1926. Dec. 3. VISCOUNT DUNEDIN. My Lords, I have found it more than ordinarily difficult to come to a determination in this case, and I frankly confess I have not had the assistance from the Courts below to which I think I was entitled. Two of the learned Lords Justices considered that the case was ruled for them by the case of *Davies* v. *Glyncorrwg Colliery Co.* (3), decided by another division of the Court of Appeal. One of them thinks a distinction can be drawn between that case and this, but forbears to draw it. The

(1) [1915] A. C. 18.
(2) 1909 S. C. 1292.
(3) [1925] 2 K. B. 339.
(4) 1924 S. C. 807.
(5) 1925 S. C. 287.

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other learned Lords Justices speak in distrustful terms of the decision, but absolutely refuse to state what is their own opinion, and all three concur in saying that the case must come to your Lordships' House and they will not let your Lordships' minds be darkened by any counsel they can give.

The case raises an exceedingly difficult question on s. 14 of the Workmen's Compensation Act, 1923. The only redeeming feature is that the facts disclose with what I may term a brutal frankness the extent of the workman's demand and what it may lead to in other cases.

The facts are these: the workman contracted the disease known as miners' nystagmus while in the service of the employers. The result was total incapacity, and accordingly, on and after October 17, 1923, he was paid full compensation at the rate of 35*s.* per week. This was done by voluntary agreement. There was no recorded memorandum and no arbitration. On November 26, 1924, the compensation was reduced, again by agreement, to 1*l.* a week. On September 3, 1925, the employers ceased to pay, alleging that the workman had completely recovered. The workman denied the allegation. Upon this the employers commenced arbitration proceedings by way of review. The workman filed his answer on October 13, 1925, denying capacity. On October 24, 1925, on the eve of the case being heard by the arbitrators, the workman's solicitor wrote to this effect:—

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"We are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act you are not entitled to stop his compensation until an order of the Court is actually obtained. No medical evidence is necessary and you may take this letter as an admission that our client is no longer suffering from nystagmus."

On October 27 the arbitrator pronounced the following award:—

"1. I order that the applicants, The Ocean Coal Co., Ld., do pay to the respondent, Daniel Davies, the weekly sum of 1*l.* as compensation for personal injury caused to the

said Daniel Davies on the 17th day of October, 1923, by accident arising out of and in the course of his employment as a workman employed by the said applicants, such weekly payments to commence as from the 3rd day of September, 1925, and to continue until the 27th day of October, 1925.

" 2. And I order that the said weekly payment be and the same is hereby ended as from the 27th day of October, 1925."

And he at the same time made available the following very clear note :—

" NOTE.—The only point in this case was whether the respondent was entitled to compensation from September 3, 1925 (when it was admitted he had recovered), up to the date of the award, or if not up to that date, up to the date of the filing of the application for arbitration. I came to the conclusion that a weekly payment could not be said to be ended pursuant to an arbitration within the meaning of section 14 of the Act of 1923 till after the award had been given, and that the workman was accordingly entitled to compensation up to the date of the award. I called attention to the judgments in the Court of Appeal in *Davies* v. *Glyncorrwg Colliery Co.*" (1)

An appeal was taken to the Court of Appeal and the order of the arbitrator was affirmed. The way the learned judges dealt with the question I have already mentioned.

I now recall what was the state of the law at the time of the passing of the Act of 1923. The law is all contained and expounded in the case in this House of *Gibson & Co.* v. *Wishart.* (2) That case pointed out how the Scotch Courts had originally decided that the compensation being de facto paid could only be ended in an arbitration to end as at the date of the decree in the arbitration, and had subsequently, in the case of *Donaldson Brothers* v. *Cowan* (3), taken the view that the proper date was the date of the application for review, while the English Courts had held that the award when made might be retrospective to the date when the employers alleged and the arbitrator found that incapacity

(1) [1925] 2 K. B. 339; 18 B. W. C. C. 86. (2) [1915] A. C. 18.
(3) 1909 S. C. 1292.

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had ceased. It then adhered to the view of the English Courts.

It may now be as well to set out the section of the Act of 1923, which is said to alter that law. Sect. 14, with the marginal note, is as follows :—

"RESTRICTIONS ON ENDING OR DIMINISHING WEEKLY PAYMENTS.

"An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in the following cases :—

"(*a*) where a workman in receipt of a weekly payment in respect of total incapacity has actually returned to work ;

"(*b*) where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased ;

"(*c*) where the medical practitioner who has examined the workman under paragraph (14) of the First Schedule to the principal Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman :

"Provided that—

(i.) in the last-mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by a medical referee in pursuance of paragraph (15) of the said Schedule as amended by this Act ; and

(ii.) where an application has been made in pursuance of the said paragraph (15) as so amended to refer the dispute to a medical referee, it shall be lawful for the employer, pending the settlement of the dispute, to pay into court—

(*a*) where the notice was a notice to end the weekly payment, the whole of each weekly payment becoming payable in the meantime;

(*b*) where the notice was a notice to diminish the weekly payment, so much of each weekly payment so payable as is in dispute;

and the sums so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the Registrar or, on appeal, the judge;

(iii.) nothing in this section shall be construed as authorizing an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so."

Before I turn to the section itself let me say a word as to the *Glyncorrwg* case (1), though, of course, that case does not bind your Lordships. I do not say that case actually decided the point, but I agree with those of their Lordships who thought that the judgment involved the point. The distinction between that case and this was that there the employers began proceedings under sub-s. (*c*) of s. 14. There was then a counter-notice. Then the proceedings stuck, for neither party would move, and then the workman went to arbitration. But when the arbitrator came to pronounce his award he ended compensation as at the date of the actual recovery, which he found was what the employers had said, and that was altered by the Court, who held that notwithstanding his recovery he was entitled to payment up to the date of the award. That seems to me absolutely to involve the point, for if the argument of the appellants here, the

(1) [1925] 2 K. B. 339.

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employers, is right, inasmuch as the arbitrator came to the conclusion that there was recovery, he was entitled, as he did, to make his award retrospective.

I now come to the section. Now when I come to analyze it, I find that the first and leading provision of the section is to prevent the employer doing what otherwise he would be entitled to do. He shall not be entitled to end or diminish. Now it has been sought to say that the words will receive adequate effect if we refer them to a stopping of payment at his own hand; but that would not help the workman. If on proceeding to arbitration to find out whether the stoppage was arbitrary or not the award was entitled to be, as *Wishart* (1) had held it, retrospective, the workman was exactly where he was before the Act. Therefore I come, I must say, clearly to the conclusion that this section was to bestow a new privilege on the workman, and that privilege I have no shadow of doubt was meant to be that of keeping payment going until it was ended, either by agreement or award or by the procedure under sub-s. (*c*). My difficulty does not arise in what I think is the intendment of the statute. It arises on the consideration of whether the words used have been adequate to carry out the intention of the statute and, I confess after much hesitation, I have come to be of the opinion that they are.

I have said before that I think in interpreting a statute a Court must take it that the statute is meant to work, and that it should not allow the statute to be defeated unless the words used are quite inadequate to have the desired effect. Now, I think the scheme of s. 14 is this: payment which is being de facto made must be continued until it is ended in any one way of five ways:—

(1.) Agreement;

(2.) Award;

(3.) and (4.) The circumstances under sub-ss. (*a*) and (*b*), and

(5.) The procedure under sub-s. (*c*).

The whole difficulty, to my view, has been in the words

(1) [1915] A. C. 18.

"In pursuance of an arbitration." Why should not that be an arbitration invoked after the dispute has arisen and the compensation de facto stopped, and then under *Wishart* (1) the award may be retrospective? I think the only and in the end to my mind compelling answer is, that, if so, the section did nothing for the workman at all. Sub-s. (*c*) is a section for the employer alone, so that if *Wishart* (1) stands the workman gets nothing by the section. But if "in pursuance of an arbitration" only means if the arbitration is a thing of the past, then *Wishart* (1) is displaced; the de facto payment must go on till the award ends it. It is obvious that in some cases the arbitration might be prolonged for a long time, and it is therefore, as I think, as a rider in favour of the employer that sub-s. (*c*) comes in.

My Lords, I am not insensitive to the fact that de facto payment for complete recovery is travestied by the word "compensation," which properly means compensation during incapacity, while here there is capacity. I confess the section is badly framed, but I think its object is clear and that it is not so badly framed that it cannot be carried out.

My Lords, I think this is clearly the opinion of the Master of the Rolls in the *Glyncorrwg* case. (2) I wish the matter had been more developed, but the attention of the Court was too much directed to what was to be done, while the proceedings under sub-s. (*c*) had been initiated and then allowed to collapse. It is clear that the point was in the mind of the learned Master of the Rolls, for in the report he is said to have asked: "Can there be an award operating retrospectively within the meaning of the commencing paragraph of section 14?" To which the learned counsel made an answer quite beside the point: "I know of no award which has been retrospective." With deference to him, it is not a question of his experience, it is a question of what is permissible under the statute.

While, therefore, I do not conceal that it has been a matter of great difficulty to me, and while it is the fact that no case on the point has been decided which binds your Lordships,

(1) [1915] A. C. 18. (2) [1925] 2 K. B. 339, 342.

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I think it is only right to say that this view has the support of a great deal of judicial opinion. There are at least two of the learned judges in the *Glyncorrwg* case (1); there are the four judges in the case of *Niddrie and Benhar Coal Co.* v. *Dee* (2), which we are about to dispose of, and I think there must be added those of Lords Skerrington and Cullen in the case of *O'Hare* v. *Bent Colliery Co.* (3), in which case there is a very clear opinion of Lord Sands. I am therefore of the opinion that the appeal should be dismissed.

LORD ATKINSON. My Lords, I regret that I am unable to concur in the conclusion to which my noble and learned friend on the Woolsack has arrived. The relevant facts of this case are simple. The respective contentions of the parties are clear. Daniel Davies, a workman of the appellants, was admittedly rendered totally incapacitated from doing his appointed work for his employer by an attack of miners' nystagmus. By an agreement, not in writing, his employers paid him for a substantial period a certain weekly sum on the footing of that total incapacity. On September 3, 1925, the appellants ceased to make this payment or any payment to the respondent, and an application or request for arbitration under the Workmen's Compensation Act of 1906 was made to the county court at Bridgend in Glamorganshire for the review, termination or determination of this weekly payment made in respect of the personal injury the defendant had sustained, on the ground that since September 3, 1925, his incapacity had wholly ceased. The respondent on October 13, 1925, served a notice in answer to the effect that since September 3 he had been incapacitated from performing his ordinary work. The learned county court judge then, despite the provisions of s. 1 of the Act of 1906, and of para. 1 of the First Schedule thereto, providing between them first, that this weekly sum is compensation paid to the workman for the injury caused to him by an accident arising out of and in the course of his employment, and, second,

(1) [1925] 2 K. B. 339. (2) 1926 S. L. T. 643; post, p. 299.
(3) 1924 S. C. 807.

that that compensation must take the shape of a weekly payment during the incapacity, held the weekly payment should continue to be made up to October 27, 1925, the date of his award, though it was admitted that the respondent had since September 3 completely recovered. The learned judge gave no definition of what is the character of this weekly payment as paid for nearly seven weeks. It is not compensation, for the incapacity has ceased. I thought Mr. Montgomery almost suggested that it was something like alms which the Legislature designed, out of tenderness for working men, to secure to them at the employers' expense. It would be well to examine how closely the Act of 1906 and the Schedule of Rules are knit with the Act of 1923 and how vital is the connection.

Before the arbitration came on for hearing the solicitors of the respondent wrote a letter to the solicitors of the appellants to the following effect :—

"Dear Sir,

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"We are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act you are not entitled to stop his compensation until an orderof the Court is actually obtained. No medical evidence is necessary, and you may take this letter as an admission that our client is no longer suffering from nystagmus."

In the Workmen's Compensation Act of 1923, the Workmen's Compensation Act of 1906 is referred to as the principal Act. By s. 3 of the Act of 1923, para. 1 of the First Schedule of this principal Act is modified by the substitution therein of the sum of 200*l.* for 150*l.* By s. 4, sub-s. 1, of the Act of 1923 it is enacted that in the first paragraph of the First Schedule thirty shillings shall be substituted for 1*l.*, as the maximum amount of weekly payment, and by sub-s. 2 it is enacted that if the maximum weekly payment payable under the principal Act (as amended by the foregoing sub-section) to a workman who is totally incapacitated is less

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than twenty-five shillings, the workman shall be entitled during such incapacity to a weekly addition equal to one-half the difference between such maximum weekly payment and the sum of twenty-five shillings, or his average weekly earnings, whichever is the less, and such addition shall, for all the purposes of the principal Act, be treated as if it were part of the weekly payment, but notwithstanding that this addition is for the purpose of the principal Act to be so treated, it is expressly provided that the workman is only to be entitled to it during incapacity. This qualification is thereby introduced into the principal Act.

By the first section of the Act of 1906 it is enacted that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as thereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to the Act. And sub-head (*b*) of para. 1 of that Schedule provides that where total or partial incapacity for work results from the injury sustained by the workman, a weekly payment during the incapacity not exceeding 50 per cent. of the average weekly earnings during the previous twelve months if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound, provided that (*a*) if this incapacity last less than two weeks no compensation shall be payable in respect of the first week, and (*b*) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, 100 per cent. shall be substituted for 50 per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings. Now such is the basis, and such the limits, of the employers' liability fixed by the above mentioned provisions of the Act of 1906, the principal Act.

The provisions of the Act of 1923 above set out, engrafted as it were upon this principal Act, are comparatively trifling.

They are quite consistent with the principle embodied in the earlier statute, and do not substantially divert or limit or alter its operation and effect. If the workman should not be paid by the employer the weekly payment to which he may be entitled while total or partial incapacity continues, he can of course enforce his remedy at law.

But I can find nothing in either statute authorizing a distribution of doles among workmen after their incapacity has ceased, though these doles should be ticketed as weekly payments. If there be found in either of these statutes clear, direct and unequivocal provisions requiring legal tribunals to decide in favour of a claim which is of this nature, of course the statutes must be obeyed; but if there should be no such express and coercive provisions in them, then I think it is a mischievous and unfortunate practice to award to a workman, after his incapacity has ended, money that he neither by work nor by suffering has earned.

In *Gibson & Co.* v. *Wishart* (1) it was held that the jurisdiction to award weekly compensation is limited to the existence of the incapacity. That case no doubt came within the Act of 1906.

Now the coercive legislation which, despite the provisions of the Act of 1906 and the Schedule of its Rules, entitled the arbitrator to make such an award as he has made, is to be found, it is contended, in s. 14 of the Act of 1923. This latter is a very ill drawn section. If obscurity was the object sought after it has been attained. If the repeal of the cardinal provision of the Workmen's Compensation Act of 1906—namely, that requiring the payment of the stipulated compensation for injury only while incapacity lasts—was aimed at, one would think it might have been effected with courage and clearness. That method, however, apparently has had no attraction for the framers of s. 14, and accordingly a somewhat stealthy kind of method, mild and harmless in appearance, is introduced, which, if interpreted as it has been in this case, is, it appears to me, opposed to the cardinal principles of the

(1) [1915] A. C. 18.

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statutes dealing with workmen's compensation, and to the principles of common honesty in addition. Sub-s. (*a*) of this section indicates, so far as it goes, that a workman who is totally incapacitated, but who gives the best proof that his incapacity has ended, and has returned to work, is not to get at the same time the weekly payment and the wages he presumably earns at his work. Sub-s. (*c*) (ii) provides in effect that where an issue has been knit between the medical practitioner of the employer and the medical practitioner of the workman, and the matter in dispute between them is referred, as it may be, to a medical referee, the employer may, pending the settlement, pay into court (where the notice he served was a notice to end the weekly payments), the whole of such weekly payments payable in the meantime, and where the notice is to diminish the weekly payment, so much of the weekly payment as is in dispute, and the sums so paid into court shall, on the settlement of the dispute, be paid to the employers or the workman according to the effect of the certificate of the medical referee, or if the effect of that certificate be disputed as, in default, it may be determined by the registrar or on appeal by the judge.

Well, this seems to be a most reasonable provision protecting both the employer and workman alike till their dispute is settled, if not by the medical referee, by the registrar or judge. The amount to be paid into court would, where the notice was to end the weekly payment, be the whole of those payments payable in the meantime up to the ending of the dispute.

The main reliance of the respondent was, it appeared to me, on the first four and a half lines of this s. 14. I think it is clear that the object of this provision was to deprive the employer of the power or right, to which he was theretofore entitled, arbitrarily, at his own will and pleasure, to end or diminish the weekly payment. Under this section he may still terminate the weekly payment if, in the doing of that, he acts "in pursuance of an agreement or arbitration." If anything is clear I should think it is that the words "pursuance of an agreement or arbitration" mean in

this connection simply the doing of what an agreement or an arbitration authorizes and entitles the employer to do. A tenant pays his rent in pursuance of his lease. If an arbitrator awards that A. B. shall do a certain thing, in the doing of that thing A. B. is acting in pursuance of the arbitration in which the award was made; so construed, this section would effect the object it was, I think, really designed to effect—namely, the deprivation of the employer of the arbitrary right and power, at his own unfettered will, to end or diminish the workman's weekly payment.

But s. 14 so interpreted leaves the first section of the Act of 1906 and the Rules of the First Schedule to it unrepealed and in full force and effect. The workman does not in truth lose his weekly payment by any act of his employer. He loses it, and must in justice lose it, by the operation of the statutory enactment on his admission that his incapacity had terminated. In my view the learned judge had no jurisdiction whatever to make the decree he made. No more than he would have if in a suit brought by a creditor to recover a debt from a debtor, the creditor before the hearing began served notice on the debtor that he admitted that the debt had been paid before the suit commenced. I think the decision appealed from was erroneous and should be reversed and this appeal be allowed with costs here and in the Court of Appeal.

LORD SHAW OF DUNFERMLINE (read by VISCOUNT DUNEDIN). My Lords, the respondent was a coal miner in the employment of the appellants. During the course of his employment he contracted the disease of nystagmus. The appellant company admitted liability for compensation. Davies was paid for over a year full compensation at the rate of 35*s*. By agreement of parties that was then limited, there having been partial recovery from the disease, to 1*l*. per week. On September 3, 1925, the fact is that Davies had entirely recovered. That is the cardinal fact in the case.

His incapacity ceased. It was admitted that he was then capable of performing his ordinary work at his ordinary

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rate of wages. On that date, or a week thereafter—namely, on September 10—the appellants stopped payment to him, and on September 21 they made a request for arbitration, stating plainly the reason—namely, the respondent's recovery. The respondent, however, denied this fact; but before the arbitration came on for hearing before the judge—namely, on October 24, 1925—the solicitors for the respondent wrote to those for the appellants: "We are prepared to admit that our client has recovered from nystagmus. We intend, however, to argue that under the new Act (that is, the Workmen's Compensation Act, 1923) you are not entitled to stop his compensation until an order of the Court is actually obtained. No medical evidence is necessary, and you may take this letter as an admission that our client is no longer suffering from nystagmus." It was further admitted that that recovery had taken place by the date of the weekly payment being stopped—namely, on September 3.

Reduced accordingly to its elements, and apart from all questions of procedure, the proposition is that a workman is entitled to recover from his employer compensation in respect of incapacity for a period after that incapacity has ceased. This is said to be the result of language employed under the statute of 1923.

My Lords, I am of opinion that, complicated as are the questions which arise in the construction of that statute, it was not intended by it, nor does it provide, that that peculiar result should follow. But in view of various decisions which have been pronounced, the tendency of which, in my humble opinion, has been to obscure and fail to give effect to the fundamental principle and provision of the statute of 1906, it is necessary to begin at the beginning, to see what is the nature and scope of the compensation under the Act named.

The liability is imposed by s. 1—a liability "to pay compensation in accordance with the First Schedule." Under that Schedule (1.) (*b*) where "total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly

earnings," etc., and in paragraph 3 it is prescribed that in fixing the amount of the weekly payment "regard shall be had to any payment, allowance or benefit which the workman may receive from the employer during the period of his incapacity."

It is really unnecessary to insist on the essentiality of this condition of liability. As has been pointed out in previous cases, it is not the award which creates the liability; an award is merely part of the machinery for determining its amount and for having it enforced. But the liability is imposed by the statute itself, and the statute uses no doubtful language as to the period and purpose of compensation. Where an accident has occurred arising out of and during the course of a workman's employment the statute says that the workman is to receive compensation during the period of the incapacity resultant from that accident. It is most necessary in view of the numerous questions which have arisen in applying the machinery and procedure prescribed by the Act to effectuate the payment of this compensation to reaffirm that unless it is impossible to avoid such a result the Act should not be made the instrument of recovering payment for a period during which that incapacity had ceased, which incapacity was the fundamental reason and condition upon which compensation was given.

I refrain from citing at length the decisions upon these points under the Act of 1906. These decisions mark the stages of (1.) giving compensation only from the date of an arbitrative award and (2.) from the date of beginning the proceedings of the arbitration—these decisions were dealt with in the case of *Gibson & Co.* v. *Wishart* (1)—and (3.) the final stage was reached and it was definitely decided that when incapacity ceased the period of liability in compensation under the statute ceased.

There can be no dubiety as to the pronouncements made in that case. Said Lord Haldane: "I do not see how" (it being an application for review), "this being a judicial review of the state of health subsequent to the previous decision,

(1) [1915] A. C. 18, 23, 27, 30.

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and the result of that decision having been limited to the period of incapacity, the workman can claim that payment should be made to him after he must be taken to have ceased to be incapable."

Lord Atkinson puts the matter thus: "For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that when proceedings for review have been properly instituted the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended."

And, if I may be allowed to quote my own judgment: "In Scotland the effect of the recording of the award—an effect making it by the Act 'enforceable' as a decree arbitral—appears to some extent to have been emphasized at the expense of the consideration that the weekly payment was to be made during the continuance of the incapacity." I add this further general observation, to which, after all the experience of these years, I still venture to adhere: "I humbly look upon all the provisions as to procedure for review of the award to be provisions to enable Courts and arbitrators to get back to that cardinal point, to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity as to square with the facts."

The question in the present appeal is whether the employer—for it is simplified down to that—has been made liable not only for compensation during the workman's incapacity but, in addition, for compensation during a period of capacity. It is admitted in this case that on September 3, 1925, when the compensation was stopped, the nystagmus had gone and the workman's capacity for all his ordinary work had returned. In my opinion, the Legislature in the Act of 1923 did not intend that compensation should be so continued.

What happened in point of procedure has been seen; the payment is stopped, say, on September 10. Eleven days thereafter, the application for review is made; and, before

it is heard, it is admitted to be the fact that the incapacity had gone when the payment was stopped. The solicitors' letter raises the point for determination: "You are not entitled to stop his compensation until an order of the Court is actually obtained."

This point depends upon a construction of s. 14, which provides that "an employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end . . . . a weekly payment, except in three cases which follow: namely, (1.) the workman's return to work; (2.) his weekly earnings have actually increased; and (3.) where a medical man has certified recovery." It is provided that in the last case, if there be a conflict between the medical men employed by the parties respectively, a medical referee should be brought in and, pending the settlement of the dispute, the weekly payments unpaid shall be paid into court.

There is a last proviso, which is not unimportant, to the following effect: "Nothing in this section shall be construed as authorizing an employer to end or diminish a weekly payment in any case in which or to the extent to which, apart from this section, he would not be entitled to do so." The assumption of that sub-section is that there are cases, apart from the section altogether, where the employer would be entitled to end the payments.

The present is not one of the three cases specified in s. 14. If it had been a medical reference case, the employer's rights would have been safeguarded, as well as those of the workman, by a payment into court, and in the result, to use my own language, the payment would have been made to square with the incapacity. The disability of s. 14, that an employer shall not be entitled "otherwise than in pursuance of an agreement or arbitration," to end the payment, seems to me to point clearly to the fact that he is entitled in pursuance of an arbitration to do so. For that reason no doubt, when it was clear that an agreement was not to be come to, a request for an arbitration for review was properly made.

But, says the respondent, he could only be entitled to end payments of compensation "in pursuance of an arbitration,"

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and "in pursuance of an arbitration" means that the arbitration must have been begun, continued and ended before the compensation could be stopped. Therefore, proceeds the workman, the injustice so clearly pointed out in *Gibson & Co.* v. *Wishart* (1), of compensation being paid for a period of incapacity, must be an injustice now legalized by statute.

My Lords, I cannot acquiesce in this reasoning. I think it involves a strain upon the words "in pursuance." I think those words mean simply that when an arbitration takes place, the ending of payment must be in accordance with it and with the arbitrator's determination of the date when incapacity ceased. We shall assume that in the present case the unfounded contention on the facts had been persisted in, and at the end, it may be, of protracted proceedings lasting for months, the arbitrator concluded his review of all the facts by affirming that the man had completely recovered on September 3, 1925. My construction of the words "in pursuance of an arbitration" is that once the arbitrator determined that fact, then liability under the principal Act, that of 1906, evaporated.

It is quite manifest also from the illustration just given that if this were not so the workman might be in receipt of compensation during long periods of capacity, and he would have managed to secure these essentially improper allowances by the simple device of denying patent facts and causing great delay till they were proved. It must be finally noted that when the arbitration is entered upon, it is open to, and indeed the duty of, the arbitrator to say when the workman's incapacity ceases. After that, the statute fits the compensation to that fact. There is nothing in the Act of 1923 which disables an arbitrator from finding out the truth and stating it on this point, nor do I read the Act which is said to have been passed in contemplation of *Gibson & Co.* v. *Wishart* (1) as going a single step in the direction of using language from which it would be clear that not until an arbitration came to a close could the anomaly of paying

(1) [1915] A. C. 18.

compensation to a completely recovered workman come to an end. If words to that effect had been used it might, of course, be a question whether the proposers of a measure plainly showing that could have secured its passage. With that, however, we have here nothing to do. The case manifestly was one which demanded, if the view taken by the Court below is right, in clear and unambiguous words an extension of compensation to cases where the reason for it had disappeared. I think there are no such words.

Two of the learned judges held that the decision of *Davies* v. *Glyncorrwg Colliery Co.* (1) was one to which they must bow as substantially deciding the point. Frankly, I think it did. Scrutton L.J. did not think so, but formulated opinions which are in accord with the judgments now delivered in this House. In accordance with these opinions, the case of *Davies* and recent Scotch cases in a similar sense must be held to have been wrongly decided. I am humbly of opinion that this appeal must be sustained.

LORD WRENBURY (read by LORD CARSON). My Lords, in this case the workman began to suffer from miners' nystagmus on October 17, 1923. By agreement the appellants made him a weekly payment from October 17, 1923, until September 3, 1925, by way of compensation for the incapacity.

On September 3, 1925, the appellants stopped the weekly payment, and on September 21 served on the respondent an application for arbitration under the Act, asking for termination of the weekly payment as from September 3 on the footing that at that date he had completely recovered. The respondent, by answer on October 13, 1925, contended that he was still incapacitated, but on October 24, before the arbitration came on for hearing, his solicitors wrote to the appellants' solicitors a letter saying: "You may take this letter as an admission that our client is no longer suffering from nystagmus." It was admitted further before the county court judge that on September 3 also the respondent had recovered.

(1) [1925] 2 K. B. 339; 18 B. W. C. C. 86.

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The respondent contends that nevertheless the appellants were not entitled to stop his compensation until an order of the Court was actually obtained. The arbitration took place on October 27, 1925. The judge held that payment was due until October 27, 1925—the date of the order. The Court of Appeal dismissed the employers' appeal.

The question turns upon s. 14 of the Act of 1923. It is undoubtedly a very difficult section, but it is much easier to arrive at its true meaning if two points are borne in mind—namely, (1.) that the basis of the workman's claim is found in Sch. I. (1.) (*b*) of the Act of 1906, in the words "a weekly payment during the incapacity," and (2.) that payment de facto and liability to make payment are distinct things.

As regards the former there is nowhere to be found in the Act of 1906 or the amending Acts anything to control that phrase "a weekly payment during the incapacity." Wherever I find subsequently in the Acts the words "weekly payment" I am entitled to supply the words "during the incapacity" as if they were there repeated. If the matter goes to arbitration the arbitrator can give no more than a weekly payment during the incapacity. He cannot award a payment to be made after incapacity has ceased. At the moment at which incapacity ceases the weekly payment which he has awarded ipso facto comes to an end. There is no adjudication of any payment due in respect of the next week. The arbitrator has no power to award any payment for that week. He cannot by his award create a debt for a weekly payment to be made after incapacity ceased.

As regards the latter a statutory provision that the employer shall not be entitled to end or diminish a weekly payment is a provision that the employer shall de facto continue to pay but not necessarily that his liability to pay is thereby enlarged. It may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying de facto, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover. In my opinion this is the effect of the section.

I may point attention in the first instance to an extraordinary result that would ensue in one case mentioned in s. 14 if this is not the result. Assume that the workman has entirely recovered and has "actually returned to work" the employer may stop payment: s. 14 (*a*). But suppose that he does not return to work, but (although he is perfectly capable of work) he ostentatiously announces that he is not going to work, that he prefers to be idle and to draw his weekly payment. It follows, if the respondent's contention is right, that the employer would be compelled to go on paying until an arbitration which might not be completed for weeks or months had resulted in an order, and could not even then recover the payments which de facto he had continued to make.

The opinion which I expressed in my judgment in the case of *Niddrie and Benhar Coal Co.* v. *Dee* (1) (a judgment which was written before the present case was argued, although it is only now about to be delivered) goes a long way towards the decision which must be reached in the present case. It will repay investigation if the alternative of a medical referee under s. 14 (*c*) is further considered upon the lines on which I discuss it in that case. Assume that the employer has opened the ball by serving on the workman a notice of his intention to end the weekly payment; the first possible event is that the workman takes no action. In that case the employer can stop payment at the end of the ten days. The second possible event is that the workman within the ten days sends to the employer a medical report that he has not recovered or has only partially recovered. In that case the employer can only end or diminish the weekly payment in accordance with the report which the workman has obtained or such modification as the employer can obtain from a medical referee in pursuance of s. 15 of Sch. I. of the Act of 1906. But here again two alternatives arise. The matter may (*a*) go on as a medical reference, or (*b*) it may not. The Court may, under s. 11, sub-s. 1, send the matter to arbitration and refuse to allow the medical reference if

(1) Post, p. 299.

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it finds exceptional difficulty or other sufficient reason for doing so. In case (*a*) certainly, and, as I think, in case (*b*) also, the employer may pay into court instead of paying the workman, but only in case (*a*) does the Act provide that the money in court shall be paid out to the winning party. Here then are only two possible views. The first is that in case (*b*) the employer cannot pay into court but must continue to pay the workman. The second is that although he can pay into court, the money in any event must be paid out ultimately to the workman, because there is nothing to intercept the veto in the opening words of s. 14 of the Act of 1923 about ending or diminishing the weekly payment. My Lords, a construction of the section which leads to that result is, in my opinion, impossible. It cannot be that in one event the employer is and in the other is not entitled to be relieved of liability as from the date when incapacity ceases.

All these difficulties disappear if the two points which I stated at the outset are well founded and are observed. Read s. 14 as follows: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish de facto a weekly payment during the incapacity under the principal Act except, etc." If that is the meaning it leaves the right de jure unaffected. It decides nothing as to whether the payment "during the incapacity" is due de jure or not. It creates in the employer an obligation to pay de facto whether he is de jure liable or not until the liability de jure is determined. This is, of course, a new enactment in favour of the workman, but is not an enactment that if on the result of an application to recover it is decided that the incapacity had ceased at the date at which the employer alleged that it had ceased, then the award on the original application which could only be an award of payment during the incapacity is extended to an award of payment in respect of a subsequent week when there was no incapacity.

We heard much during the argument of the words "otherwise than in pursuance of an agreement or arbitration."

They do not, to my mind, assist the matter much one way or the other. They only provide that the veto upon the discontinuance of payment may be lifted in pursuance of an agreement or by the action of an arbitrator.

In *Gibson & Co.* v. *Wishart* (1) this House in 1914 decided that if an employer has de facto ceased to pay at a date which he alleged to be and which was subsequently found to be the date of recovery, the arbitrator can, on an application to review, terminate the weekly payments retrospectively as at the date of recovery. I find nothing in the Act of 1923 which affects that decision.

Sect. 14 of the Act of 1923 does no more, I think, than provide in favour of the workman that in some cases he shall continue to receive de facto the weekly payment which (if the employer is right) ceased to be payable under the agreement or award when the condition imposed by the words "during the incapacity" was no longer satisfied. It fails to work this out properly in the several events which it mentions. But it remains that it has not granted to the workman a weekly payment after incapacity ceased. When the question at issue—namely, has incapacity ceased or not and when?—has been answered it leaves untouched the rights of the parties to have any payments made de facto readjusted in accordance with the payments which were payable de jure. This is, in my opinion, the true construction of the section.

For these reasons this appeal, in my judgment, succeeds, and the matter must be referred back and an award made terminating the weekly payment as and from September 3, 1925, and ordering repayment of any weekly payments made since that date. The appellants must have their costs in the county court and in the Court of Appeal and in this House.

LORD CARSON. My Lords, I am conscious of the fact that whatever decision is arrived at can be easily criticized as creating anomalies, but that is due to the difficulties

(1) [1915] A. C. 18.

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created by the terms of s. 14 of the Act of 1923. I think it is worth while to glance at the preliminary proceedings before the county court judge in the matter of the arbitration which led to the order appealed against. The request for arbitration is in the usual form with respect to the review and termination of the weekly payment payable to the respondent under the Workmen's Compensation Act, 1906, and on the particulars the grounds on which determination is claimed are stated to be: "(i.) That the respondent on the 3rd September, 1925, had recovered from his said nystagmus; (ii.) that the respondent has not since the 3rd September, 1925, been incapacitated by reason of his said nystagmus from performing his ordinary work at his ordinary rates of wages," and the answer of the respondent was that the applicants were not entitled to the relief sought and that the grounds of his contention were that he had not recovered as alleged in the applicants' particulars. The only issue therefore raised to be determined in the arbitration was whether the respondent had or had not recovered as alleged. This was all strictly in accordance with the provision of the Act of 1906 and the rules made thereunder from which alone the county court judge derived jurisdiction. By the admission of the respondent as found by the county court judge the issue was found in favour of the appellants, but the county court judge notwithstanding by his award dated October 27, 1925, ordered the appellants to pay "the weekly sum of 1*l.* *as compensation* for personal injury coming to the respondent by accident arising out of and in the course of his employment" from September 3, 1925, up to October 27, 1925, the day on which he gave his award.

The very terms of the award are self contradictory, as whatever may be the construction of s. 14 of the Act of 1923, it is impossible to describe the payments ordered as "compensation for personal injury," where admittedly the respondent had recovered on September 3, 1925. From what statute did the arbitrator derive authority to give such "compensation" under such circumstances? The only Act granting compensation—namely, the Act of 1906—

specifically limits the weekly payments to the duration of incapacity and makes no provision for any payments to be incurred after incapacity has ceased. We are therefore up against the question whether upon the true construction of s. 14 of the Act power is conferred upon the arbitrator in such a proceeding as that under review, having determined that upon a certain date incapacity had ceased, to order payment of compensation, not on the grounds of "incapacity," but notwithstanding the complete and admitted recovery of the respondent. My Lords, I can find nothing in s. 14 of the Act of 1923 enlarging by inference the power of the arbitrator, nor indeed in anywise altering or changing the power of the arbitrator or the object or result of the proceedings in such arbitration. It is said that unless you so construe s. 14 of the said Act you give no meaning to it, but on the other hand one can hardly conceive that if the basis of compensation for incapacity was intended to be altered by the Legislature so drastic a change would have been carried out by asking the Courts to draw such an inference from the terms of the said section. My Lords, I am of opinion that s. 14 has nothing to do with the arbitrator at all. I think it is an enactment that, pending an agreement or an arbitration, an employer is not entitled to end weekly payments under the Act of 1906, and probably if the employer, contrary to the section, did end such payments the workman would be entitled to put the law in motion to recover such payments, and the Courts would have power to insist upon such payments, either to the workman or, if the interests of justice so required, into court pending the determination of the arbitration. But I cannot understand how such payments are to be considered as compensation for incapacity, or confer any right upon the workman to retain them once it has been decided that the payments were made after the incapacity had ceased. Lord Wrenbury has already pointed out some of the extraordinary results that would follow upon any other construction than that I have indicated. May I also add one other—namely, that if the contention of the applicant was allowed to prevail the liability of the employer

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would depend, not on the duration of the incapacity, but on the length of time that elapsed in carrying out the necessary proceedings for the determination of the arbitration, a matter which might be considerably protracted through various causes over which the employer would have no control.

My Lords, as I indicated at the outset, I do not for a moment profess that I am entirely satisfied with the conclusion at which I have arrived, but in the absence of clear statutory enactment, I am unable to find any reasons for enlarging the periods of payment of compensation beyond the date when incapacity has ceased. I am of opinion therefore that this appeal succeeds.

Order of the Court of Appeal reversed, and cause remitted back to the county court, with a direction to make an award terminating the weekly payments as and from September 3, 1925, *and to order the repayment of any weekly payments made since that date. The respondent to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the county court to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Dec. 3, 1926.

Solicitors for the appellants: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

Solicitors for the respondent: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

[HOUSE OF LORDS.]

NIDDRIE AND BENHAR COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

DEE . . . . . RESPONDENT.

H. L. (Sc.)* 1926 Dec. 3.

Workmen's Compensation—Dispute as to Incapacity—Payment into Court of Weekly Payments—Refusal of Employers' Application for Reference to Medical Referee—Application for Review—"Settlement of dispute"—Charge on recorded Award for Arrears of Weekly Payments—Suspension of Charge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *First Schedule, para.* 15—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *ss.* 11, 14.

Sect. 14 of the Workmen's Compensation Act, 1923, confers no jurisdiction on the arbitrator to award compensation to an injured workman after the incapacity has ceased; *Gibson & Co.* v. *Wishart* [1915] A. C. 18 is not affected by the section.

So held by all their Lordships (by Viscount Dunedin solely on the authority of *Ocean Coal Co., Ld.* v. *Davies*, ante, p. 271).

Where a dispute arises within the meaning of s. 14 (*c*) (i.) of the Act of 1923 as to the cessation of the workman's incapacity and an application is made to refer the dispute to a medical referee, the employer, pending the settlement of the dispute, may, under s. 14 (*c*) (ii.), pay into court the weekly payments payable in the meantime, whether the medical reference is allowed or is refused on the ground that the dispute ought to be settled by arbitration.

Under an award made under the Workmen's Compensation Act, 1906, and recorded in May, 1913, in the register of the Sheriff Court, the appellants paid compensation to the respondent, an injured workman in their employment, until September 8, 1925, when they stopped payment. A dispute having arisen as to the cessation of the respondent's incapacity, the appellants applied to refer the dispute to a medical referee, but the application was refused on the ground that the matter ought to be settled by arbitration, and the appellants then applied for a review. Pending the arbitration, the respondent, under the law of Scotland, charged the appellants under the award of May, 1913, for arrears of compensation from September 8, 1925, to the date of the charge. The appellants then raised an action of suspension and consigned in court the sum charged for and a further sum for expenses, and had since paid into court the subsequent weekly payments. Suspension was refused on the ground that payment into court, under s. 14 (*c*) (ii.), was not

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* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

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applicable, except where a reference had actually been made to a medical referee :—

Held, that the suspension ought to be allowed.

Decision of the First Division of the Court of Session in Scotland reversed.

APPEAL against interlocutors of the Sheriff-substitute of the Lothians and Peebles, the Sheriff of the Lothians and Peebles, and the First Division of the Court of Session in Scotland, in an action of suspension brought by the appellants against the respondent. In the terms of an award made under the Workmen's Compensation Act, 1906, and recorded on May 12, 1913, the appellants paid compensation to the respondent, a workman injured in their employment, at the rate of 16*s.* 4*d.* per week, on the footing of the respondent's total incapacity, until the year 1925.

On July 24, 1925, the appellants, having been advised that the respondent's total incapacity had ceased and that he was partially recovered, applied to the Sheriff-clerk for a reference of that question to a medical referee, but this application was abandoned, and the appellants continued to pay full compensation until September 8, 1925. The appellants then had the respondent medically examined, and their doctor's report was to the effect that he had entirely recovered.

On September 17, 1925, the appellants, in the terms of s. 14 (*c*) of the Workmen's Compensation Act, 1923, served on the respondent their doctor's certificate to the effect that the respondent's incapacity had ceased, together with a notice intimating that at the end of ten clear days from the date thereof—namely, on September 27, 1925—they would end the payment of compensation. On September 24 the respondent served on the appellants a report by his medical practitioner to the effect that his incapacity still continued. The appellants did not accept this report, and then made a new application to the Sheriff-clerk for a reference to a medical referee of the question of the respondent's incapacity.

The Sheriff-clerk, acting under s. 11 of the Act of 1923, refused to allow the reference, being of opinion that owing

to the exceptional difficulty of the case the matter ought to be settled by arbitration, and his decision was affirmed by the Sheriff-substitute. On December 30, 1925, the appellants presented an application for review on the ground that the respondent's incapacity had ceased as from September 8, 1925.

On January 12, 1926, pending the arbitration, the respondent took diligence and charged the appellants under the award of May 12, 1913, for payment of seventeen weeks' compensation from September 8, 1925, to the date of the charge. On January 15, 1926, the appellants raised the present action for suspension of the charge, and as a condition of the suspension consigned in court the sum charged for, together with a further sum for expenses, and they had since paid into court all the subsequent weekly sums of 16*s.* 4*d.*

The appellants maintained that they were entitled, under proviso (ii.) to s. 14 of the Act of 1923, to cease payment on the expiry of the ten days' notice on paying into court the whole amounts of the payments in dispute pending the settlement of the dispute as to the respondent's incapacity.

The respondent maintained that the appellants were bound to pay him compensation until it should be determined in the application for review that the respondent's incapacity had ceased or diminished.

The Sheriff-substitute dismissed the action of suspension on the ground that, as there was no certificate of a medical referee, the appellants had not brought the case within any of the exceptions comprised in s. 14. The Sheriff adhered, and the First Division (Lord President Clyde, Lord Sands, Lord Blackburn and Lord Ashmore) affirmed both decisions.

1926. Oct. 28. *Mackay K.C.* (with him *James R. Marshall*) (both of the Scottish Bar) for the appellants. Clause (*c*) of s. 14 of the Act of 1923 comprises cases in which a medical report on the employers' part establishes a prima facie case of recovery of wage earning capacity. In such a case the prohibitory words at the commencement of the section do not apply; but this is subject to the operation of the two

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provisoes. Where the certificate and notice are countered by similar prima facie evidence tendered by the workman the section recognizes that a dispute has arisen which requires settlement. The question is: What is meant by the words "settlement of the dispute"? Prima facie that covers all forms of settlement, and is not limited to settlement by means of a reference to a medical referee. With s. 14 must be read s. 11, which makes it clear that the initiation of steps to set in motion this new procedure may not lead to a settlement of the dispute by that means and that the dispute may have to be settled by arbitration. Over the actual disposition of the settlement, whether it shall be by the referee or by the Sheriff himself as arbitrator, the employer has no control. Why should the employer be entitled to pay the money into court in the one case and not in the other? Of two possible constructions the Court will adopt that which makes the Act reasonable, just and workable. The words in the second proviso "according to the effect of the certificate of the medical referee" are relied on as negativing this construction, but those words are not sufficient to cut down the meaning of the words "pending the settlement of the dispute," which are the leading words of the proviso. Even where an application for a medical reference has proved abortive, because the question in dispute is not held suitable for that form of settlement, s. 14 authorizes an employer to withhold or vary payments of compensation pending the settlement of the dispute by arbitration on paying into court the amounts in dispute.

Jas. Macdonald K.C. and *J. S. C. Reid* (both of the Scottish Bar) (with them *Alex. M. Wallace*) (of the English Bar) for the respondent. Money can only be paid into court under s. 14 (*c*), where there has been a reference of the dispute to a medical referee. This is shown by the terms of proviso (ii.), which says that the sums paid into court "shall on the settlement of the dispute be paid to the employer or to the workman according to the effect of the certificate of the medical referee." The proviso cannot be extended to cover a case where a certificate of a medical referee cannot be obtained. In such a case

there can be no "settlement of the dispute" within the meaning of the section. The section contains no warrant for paying compensation into court pending an arbitration or an application for a review, but the present case falls under the general rule at the beginning of the section prohibiting the ending or diminishing of a weekly payment otherwise than in pursuance of an agreement or arbitration. Sect. 14 was passed to put an end to a grievance created by *Gibson & Co.* v. *Wishart.* (1) The effect of that decision was to withhold compensation, which might ultimately be held to be due to the workman, pending an arbitration, which might last a very long time. On the other hand, in the case of a medical reference the decision would generally be obtained in a very short time, and the workman would suffer no serious hardship from the compensation being paid into court. *Davies* v. *Glyncorrwg Colliery Co.* (2) and *Lindsay* v. *Glasgow Iron and Steel Co.* (3) support the respondent's contention. *Penman* v. *Caprington and Auchlochan Collieries* (4) was wrongly decided. Further, this payment into court was made in the action of suspension and was not made under s. 14.

Mackay K.C. replied.

The House took time for consideration.

1926. Dec. 3. VISCOUNT DUNEDIN. My Lords, underlying this case is the same general question as to the effect of s. 14 of the Workmen's Compensation Act, 1923, as was raised in the case your Lordships have just disposed of. Had I been giving my opinion in this case without that case having been decided, I should have been bound to come to the same conclusion as I there expressed, and then have proceeded to see how it affected the present case. But if I were now to take that course it would be of no service to any one. I think, therefore, I ought to take the result of your Lordships' judgment in the last case as settling the general question in this case, because in that way alone may I

(1) [1915] A. C. 18.
(2) [1925] 2 K. B. 339.
(3) 1925 S. C. 287.
(4) 1926 S. L. T. 299.

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be of some assistance, inasmuch as the present case is somewhat complicated by Scottish procedure, with which I am naturally familiar.

In the present case the workman had obtained an award against the employers ordaining them to pay 16*s.* 4*d.* a week during total incapacity.

This award had been recorded on May 12, 1913, in the special register in the Sheriff Court of the Lothians and Peebles under the Workmen's Compensation Act, 1906. Upon such a registered award the workman could, if the employer ceased to pay, execute a charge, and on such a charge execution by way of poinding and arrestment could follow.

On September 8, 1925, the employer de facto stopped the compensation, and being at that time minded to take advantage of sub-s. (*c*) of s. 14—I do not quote any of the sections, as they were all quoted in the last case—they served a notice on the workman accompanied by a medical certificate saying compensation will be stopped in ten days from that date. The workman replied on September 24 by a counter notice and medical certificate, and on or about the 27th application was made for a medical referee. But the Sheriff-clerk, on considering the application, thought that the case was one of exceptional difficulty and refused the reference, saying that the question must be settled by arbitration. This he was entitled to do, subject to appeal to the sheriff in respect of the terms of s. 11 of the Act of 1923.

Appeal was taken to the Sheriff, but he upheld the determination of the Sheriff-clerk.

This, so to speak, hung up the proceedings under sub-s. (*c*) of s. 14, and the employer, probably thinking it would be more expeditious just to have an arbitration, at once applied for review under para. 16 of the First Schedule of the Act of 1906, and asked that the compensation should be ended as at September 8, the day on which he had de facto stopped payment. On January 12, 1926, the workman, tired doubtless of getting no payments and of no progress having been made in the application under sub-s. (*c*) of s. 14, charged on his registered decree to enforce payment of all arrears

since September 8, 1925. On January 15 the employer raised in the Sheriff Court a suspension of that charge, and it is that suit that is now before your Lordships.

Now as to what was done. The Sheriff-substitute, on seeing the writ, as a condition of doing anything, ordered consignation of the sum sued for and 20*l.* for expenses. The consignation was made that day. That having been done the Sheriff-substitute granted a sist, i.e., stopped all further process of execution for the moment and granted warrant to cite the defender the workman, with an order to lodge defences within fourteen days. Defences were duly lodged, and on March 2 the Sheriff-substitute sustained the first plea of the defenders, i.e., a plea of irrelevancy, recalled the sist and dismissed the action. Appeal was taken to the Sheriff-principal, who, on March 24, adhered to the interlocutor of the Sheriff-substitute. Appeal was taken to the First Division of the Court of Session, who on June 29 again adhered. Both the Sheriff-substitute and the Sheriff and thereafter the learned judges of the First Division proceeded on the ground that s. 14 of the Act of 1923 had altered the law as it stood under *Wishart's* case. (1) They also held that the consignation made was not a consignation in terms of sub-s. (*c*) of s. 14. In that later determination they were clearly right. The consignation made was the common law consignation, which any judge may require as the price of going on with the suspension, and it was impossible to turn it into the special consignation authorized by sub-s. (*c*) of s. 14, the proceedings under that sub-section having been for the time abandoned.

Now, my Lords, I think it is abundantly clear that the whole foundation of the judgments rests on the view of s. 14, which your Lordships have rejected in the case just decided. I am therefore of opinion that the interlocutors fall to be reversed, and that the case be remitted to the Court of Session to again grant a sist of execution in order to await the result of the arbitration. I see no reason, however, why the order for consignation should not stand. I move your Lordships accordingly.

(1) [1915] A. C. 18.

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LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE (read by VISCOUNT DUNEDIN). My Lords, a perusal of the opinions of the learned judges of the First Division shows that they were naturally reluctant to come to the decision at which they arrived, but their Lordships, like the Sheriff-substitute, felt constrained to reach that decision on account of the terms of the statute. I cannot, speaking for myself, construe the material sections of the statute as has been done in the court below.

There are three points to which I wish to call attention :—

(1.) From the clear opinion of the learned Lord President it appears that if, for any reason, when the procedure by way of medical reference (of the point whether or not an injured workman has recovered from his injury) breaks down, then the provision for consigning the sums in dispute also breaks down, and the employer must continue to make weekly payments to the workman on the footing that he is incapacitated, although this may ultimately prove to be entirely contrary to the fact.

In my view the right to consign does not so break down. When does the right of the employer to pay the disputed sums into court arise ? It arises under s. 14 (*c*) (ii.), where an application has been made to refer the dispute to a medical referee. How long does that right to pay into court continue ? It continues to be lawful to the employer, "pending the settlement of the dispute." I think the sound construction of these words is that the settlement of the dispute is none the less pending, although the form of getting it settled may not be by the verdict of a medical referee but by the verdict of an arbiter who is appointed on account of the troublesome nature of the case.

This last consideration may incidentally cause a much longer period to be occupied in the pending of the dispute, and that, incidentally, is also a reason why the important right to consign should not be taken away.

I therefore humbly think the answer to the construction taken in the courts below is simply that, under the statute,

the appellants did make the application for review, and that the dispute is still pending and was so pending when consignation of the wages was made.

It is most essential that remedial statutes which in their course give machinery for the purpose of reaching or quantifying a remedy should not, if it can be avoided, be construed in such a way as to make the remedy itself disappear. Such a construction, it is clear, may result not only in injustice to one side or the other but in defeating the intention of the Legislature and the fundamental purpose of the Act. Fortunately in the present case I do not think that a sound construction of the Acts operates that defeat.

(2.) The more radical and underlying issue between the parties has been settled by your Lordships in the case of *Ocean Coal Co.* v. *Davies* (1), the effect of which is to show that the right to payment of compensation for incapacity ceases with the cessation of incapacity, and I have nothing to add to the judgment which I have delivered in that case on that topic. The principles laid down in *Gibson & Co.* v. *Wishart* (2) still remain.

(3.) A certain perplexity has entered into this case, because it comes before the Courts by way of suspension of a charge for payment. When the employers made application for a medical reference they would, of course, have been entitled to consign in court, as already referred to, but the workman, not being content with this statutory method, charged the appellants for payment. What the appellants then did was to bring this suspension and to consign in that process all the disputed wages, to abide by the decision of the Court, the result being that neither party was prejudiced, and both parties were protected just as they would have been protected by the payment made in the medical reference procedure. It is in that state of circumstances that the charge for payment by the workman was made. This very kind of question must have been mooted in *Gibson & Co.* v. *Wishart* (2), and I ventured, in the following language, to forecast what was the sensible course to be adopted by the parties. I

(1) Ante, p. 271. (2) [1915] A. C. 18.

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said (1): "The employer alleges that the incapacity ceased as at a certain date, and that the compensation should cease then, and he, in fact, has stopped on that account all further payments. . . . . Assume that in such an instance the workman denies any change of circumstances, and that accordingly a charge for payment in execution of the award is made. In my opinion the duty of the employer in such circumstances is instantly to institute proceedings for review by the arbitrator under the statute. He cannot bring a suspension of the charge in the ordinary sense so as to review the disputed circumstances in that process; but if the charge is persisted in he may pro forma bring a suspension and table his application to the arbitrator for review, and the Court would at once suspend in hoc statu and sist all procedure in the suspension to enable the proper and statutory review to proceed. This, in my opinion, is the sensible course. It is a course which is suitable in Scotland, and it is in substance analogous to the procedure in England."

The opinion thus given was in no respect out of harmony with the judgment of the House, and was in accord, and the procedure sketched was in accord, with the decision the principle of which still stands.

In those circumstances this suspension was brought, that is to say, a suspension of a charge to make payment of a sum or sums of wages as to which a dispute was pending; and a review was sought. The object of this suspension was to achieve exactly the position thus pointed out in *Gibson & Co.* v. *Wishart* (2), and the plea in law for the pursuers is in the following terms: "The pursuer having applied for a review of the defendant's compensation as at 8th September, 1925, the said charge should be suspended pending judgment in the review proceedings."

My Lords, that plea appears to me to be unanswerable.

I am of opinion that the charge should have been suspended upon the consignation which has been made. I agree with Lord Wrenbury in thinking that there is nothing whatsoever in the Compensation Acts to interfere with the suspension

(1) [1915] A. C. 31. (2) [1915] A. C. 18.

procedure or in particular with the power of the Court to refuse a suspension except upon consignation.

In the present case consignation has been made; the interests of parties are conserved; the purpose of the process is to allow review to proceed. I do not think it to be in accord either with principle, with the statute or with the authorities cited, that such a suspension should be refused. Should the result in the process of review be that the workman is found not to have recovered or only to have partially recovered, the consigned money or that part of it awarded will be received by the workman in accordance with his rights, and should, on the contrary, he be found to have recovered, the consigned money will be returned to the employer, no part of it having ever been really due to a workman whose incapacity had ceased.

I am humbly of opinion that the appeal succeeds.

LORD WRENBURY (read by LORD CARSON). My Lords, I am glad to arrive at the conclusion (a conclusion which every judge in the First Division would evidently have been glad to reach) that the Act does not inflict upon the employer the injustice which they thought it involved. I express myself with some hesitation in a case which involves Scottish procedure, which is not familiar to me, but, having learned from the noble and learned Lord in the chair that a creditor's "charge" in Scottish law is equivalent to the issue of execution according to the law of England, and that process of suspension in Scottish law is equivalent to an application for stay of execution according to the law of England, I do not find any difficulty in applying my mind to the consideration of the true meaning and effect of the Act in the circumstances of the present case.

By virtue of an award made under the Workmen's Compensation Act in the year 1913, the workman had received for many years the payment of a weekly sum. In 1925 the employers alleged that the man's incapacity for work had ceased, or at any rate was lessened. The workman denied it. There was a bona fide question at issue between them.

H. L. (S c.) 1926 NIDDRIE AND BENHAR COAL CO. v. DEE. Lord Wrenbury.

The workman charged the employer. The employer took proceedings for suspension. The question is whether in that state of facts the employer could be compelled to pay by reason of the charge, or whether in his proceedings for suspension it was competent for the Court to grant suspension on the terms of payment into court of the sums which the man alleged and the employer denied to be due.

The employer made application under s. 11, sub-s. 1, of the Act of 1923 to refer the matter to a medical referee. Had that been granted, s. 14 contains provisions under which, pending the settlement of the dispute, the employer would have been entitled to pay into court instead of paying to the workman, with the result that he would escape the risk of failing to obtain repayment if the question in dispute were determined in his favour. But it was not granted. The Court, under the provision of s. 11, sub-s. 1, found that the matter was one in which, owing to exceptional difficulty or for other sufficient reason, there ought to be a reference to arbitration. Has the employer in that state of facts lost the protection of payment into court instead of to the workman pending the settlement of the dispute ? That is the question to be answered.

Sect. 14 of the Act of 1923 enacts that an employer shall not be entitled to end or diminish a weekly payment except in certain stated cases. Sect. 14 (*c*) (ii.) enacts that where an application has been made to refer the dispute to a medical referee, certain things shall ensue. Upon this two observations arise : First, that the words " an employer shall not be entitled " do not extend to exclude the power of the Court to do what is just upon process of suspension, and, secondly, that s. 14 (*c*) (ii.) applies when application has been made, whether an order has been made upon it or not. The application may or may not result in an order. The enactment applies none the less just as if there were inserted after the words " to a medical referee " the words " which may or may not result in a medical reference."

The fact is that the proceedings may result in either one of two things—namely, either a medical reference or an

arbitration. The section has worked out the former of these. It has not worked out the latter. If an arbitration supervenes, there is nothing which prevents the Court from doing justice in proceedings for suspension, and there is nothing which confines s. 14 (*c*) (ii.) to the case in which the application has not been followed by an order. At the same time, it is true that if the application is not followed by an order, the destination of the fund in court is not worked out by the section. The Act is obviously ill drawn, but in my opinion it does not leave the employer exposed to the danger and injustice against which the Act protects him if there were a medical reference instead of an arbitration by order of the Court. The Court has, I think, power in the proceedings for suspension to make such order for payment into court as it thinks just, and to deal with the money in court in such manner as is right when the arbitration is concluded.

The appeal must therefore, I think, be allowed.

LORD CARSON. My Lords, I concur.

Interlocutor of the First Division of the Court of Session in Scotland reversed and cause remitted back to the Court of Session with a direction to again grant sist of execution in order to await the result of the arbitration and to do therein as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the courts below and also the costs of the appeal to this House.

Lords' Journals, Dec. 3, 1926.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *Lovell, White & King.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 Dec. 7.

MARTIN . . . . . APPELLANT;

AND

LOWRY . . . . . RESPONDENT.

MARTIN . . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE . . . . . RESPONDENTS.

Revenue—Excess Profits Duty—Income Tax—Purchase and Resales—Speculation lasting Less than a Year—"Trade or business"—"Annual profits or gains"—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

A wholesale machinery merchant purchased from the Government their surplus stock of aircraft linen under a contract, which provided that he should take delivery of the whole within six months. In order to dispose of the linen, he rented an office in London and set up a large and skilled organization, by means of which he disposed of his entire purchase in some seven months. In respect of these transactions he was assessed to excess profits duty and to income tax, and, on appeal, the Commissioners found that he was carrying on a trade or business and affirmed the assessments:—

Held, that there was evidence to support the finding of the Commissioners, and that the profits arising from his trade or business, being profits within the year of charge, were annual profits or gains within the meaning of Sch. D; that he was therefore liable both for excess profits duty and for income tax.

Ryall v. *Hoare* [1923] 2 K. B. 447 discussed and followed.

Decision of the Court of Appeal [1926] 1 K. B. 550 affirmed.

APPEALS from a decision of the Court of Appeal (1) affirming a decision of Rowlatt J. on cases stated by the Special Commissioners of Income Tax. In June, 1919, the appellant, who was a merchant of agricultural machinery, agreed to purchase the surplus stock of Government aircraft linen, amounting to some 45,000,000 yards, and to take delivery of the whole within six months from the date of the agreement. Failing to dispose of it in one bulk sale,

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

(1) [1926] 1 K. B. 550.

he rented an office in High Holborn from July, 1919, until March, 1920, and set up a large and skilled organization for disposing of it in smaller quantities. In the result some 55 wholesale firms in Belfast purchased nearly 35,000,000 yards, 208 export firms purchased another 5,000,000 yards, and the remainder was sold to 1017 retail firms. In about seven months the appellant disposed of the whole of the linen at a very large profit.

In respect of these transactions assessments were made upon him for excess profits duty under s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, and for income tax under Sch. D.

On appealing to the Commissioners the appellant contended: (1.) that the purchase was a speculation in the nature of a gambling transaction, and did not constitute the carrying on of a trade or business; and (2.) that his profits or gains were not "annual profits" within Sch. D.

The Commissioners found that he was carrying on a trade or business, and was liable for excess profits duty and for income tax.

Rowlatt J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal (Pollock M.R., Atkin and Sargant L.JJ.).

1926. Dec. 5, 6. *Latter K.C.* and *Raymond Needham* for the appellant in both appeals. As to the income tax appeal: the charge is imposed on annual profits or gains. Here there are no annual profits. "Annual" suggests repetition; annual profits must refer to profits which have at least a capacity of recurrence. The authorities show that the expression "yearly interest" as used in the Income Tax Acts does not include interest on a short loan (apart from special statutory exceptions), and that the loan must have a certain measure of permanence. Yearly interest means interest capable of recurring from year to year and "annual" as applied to profits and gains must bear the same meaning: *Goslings & Sharpe* v. *Blake* (1); *Inland Revenue Commissioners* v. *Hay*. (2) The reasoning of Rowlatt J. in

(1) (1889) 23 Q. B. D. 324. (2) 1924 S. C. 521, 531; 8 Tax Cas. 636, 646.

H. L. (E.) 1926 MARTIN v. LOWRY. MARTIN v. INLAND REVENUE COMMISSIONERS.

Ryall v. *Hoare* (1) is erroneous. As to both appeals: this was an isolated speculation and was not a carrying on of a trade; it was a coup or adventure by itself and not a thing which had in it the seeds, so to speak, of continuance as a profit earning concern. [On this point they referred to *Erichsen* v. *Last* (2); *Grainger & Son* v. *Gough* (3); and *Cooper* v. *Stubbs.* (4)]

Counsel also proposed to read the Report of the Joint Select Committee of Lords and Commons on the Income Tax Bill of 1918, and cited *Commissioners for the Special Purposes of the Income Tax Acts* v. *Pemsel* (5) and *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trademarks* (6), but, upon the Attorney-General objecting to the reading of the report in this House when it had not been read to the Commissioners, the Lord Chancellor held that the report was not admissible.

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondents in both appeals were not called on.

VISCOUNT CAVE L.C. My Lords, it is unnecessary to state all the facts of this extraordinary transaction, which are set out in the case stated by the Commissioners for the opinion of the High Court. It is enough to read the finding with which the case concludes, and which is in these terms: "Mr. Martin"—that is, the appellant, who is not usually engaged in the purchase or sale of linen—"purchased a large quantity of linen with the sole intention of selling it again at a profit, and he proceeded to sell it piecemeal by an extensive series of transactions spread over a period of seven months, using for the purpose an organization and methods such as are ordinarily adopted by traders in selling the articles in which they deal. We consider that in exercising these activities Mr. Martin was for the time being carrying on a trade, the profits of which are chargeable to income tax and

(1) [1923] 2 K. B. 447, 454; 8 Tax Cas. 521, 526.
(2) (1881) 8 Q. B. D. 414.
(3) [1896] A. C. 325.
(4) [1925] 2 K. B. 753.
(5) [1891] A. C. 531, 589, 591.
(6) [1898] A. C. 571, 574.

excess profits duty." By means of the transactions so described the appellant made a profit of something like 1,600,000*l.*, and upon that sum he has been held assessable to income tax and excess profits duty. The question is whether he was rightly so held, and, if not, why not?

Counsel for the appellant have taken two points. First, they say that the appellant did not carry on a trade or business, but only engaged in a single adventure not involving trading operations. My Lords, the Commissioners have found as a fact that he did carry on a trade, and they set out in the case ample material upon which they could come to that conclusion. Indeed, having regard to the methods adopted for the resale of the linen, to the number of operations into which the appellant entered, and to the time occupied by the resale, I do not myself see how they could have come to any other conclusion. That disposes of the appeal as to excess profits duty, which therefore fails.

With regard to the claim for income tax, the appellant takes another point. He says that at all events these profits did not come within the description of "annual profits or gains" arising or accruing in respect of a trade—those words being quoted from the first paragraph under Sch. D to the Income Tax Act, 1918. He says they did not come within those words, because they were not recurrent profits or capable of recurrence from year to year. My Lords, there are, no doubt, passages in the Act in which the word "annual" or the word "yearly" has an implication of recurrence; but one must have regard to the context in which the words are found, and, having regard to the context, I do not think that there is any such implication in the words "annual profits or gains" as applying to the profits or gains arising in respect of a trade which are taxable under Sch. D of the Act. It appears to me that in that context the words bear the construction put upon them by Rowlatt J. in the case of *Ryall* v. *Hoare* (1), where he said that the words meant "profits or gains in any one year or in any year as the succession of years comes round." He pointed out that in

(1) [1923] 2 K. B. 447.

H. L. (E.) 1926 MARTIN v. LOWRY. MARTIN v. INLAND REVENUE COMMISSIONERS.

fact the tax is imposed for one year only, and, having regard to that fact and to the context which accompanies the particular words which he was called upon to construe, he held that those words meant simply the profits or gains accruing in the year in question. I agree with that interpretation as applied to this case, and accordingly I think that the profits which are now in question come within the words of charge, and that this appeal fails. I move your Lordships that it be dismissed with costs.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

LORD SUMNER. My Lords, I agree that there was abundance of evidence to justify the Commissioners in holding that the appellant carried on a trade.

With regard to the argument raised on the word " annual," I would point out that the nature of the trade, as described in the case stated, was such as to show that there was at the outset every possibility of repeated trading operations and a considerable chance of their lasting over a protracted period, and I do not question that the word " annual," in connection with the profits of that trade, would be satisfied by profits falling within the year of charge.

In so far as the judgment of Rowlatt J. in *Ryall* v. *Hoare* (1) decided a similar point, as I think it did, I concur in his conclusion. In that case it is clear that the profits in question, whatever their other qualities may have been, had the quality of being repeated and of continuing over a considerable period ; but I wish to guard myself against appearing to agree with all his instances and observations as reported in 8 Tax Cases. I understand that your Lordships, like the Lords Justices in the Court of Appeal, affirm his decision only in regard to the exact question arising in that case and not in the full breadth of the illustrations that he gave. I would point out that the case on which he relied, which is

(1) [1923] 2 K. B. 447.

Wylie v. *Inland Revenue* (1), was one in which liability to the tax in respect of the letting of a furnished house was admitted, and the question in dispute was as to the right to a deduction. Accordingly, it is not authority, as the learned judge would appear to have thought that it was, for some of the more extended cases that he mentioned. The whole subject is a difficult one, and as I hope some time, and perhaps before long, your Lordships may have the opportunity of considering it in full detail, I make no further observation about it, except that I should wish to reserve my judgment very fully on every aspect of it that goes beyond the facts of the particular case.

LORD CARSON. My Lords, I also concur with the motion which has been moved from the Woolsack, and I should like to limit the decision as regards *Ryall* v. *Hoare* (2) to what is necessary to be decided in this case. The learned judge who decided that case introduced instances, where he thought income tax would be payable, where there was in reality no trade being carried on and where it could hardly be alleged that trade was being carried on, they being isolated transactions. My Lords, I desire, like my noble friend who has preceded me, to reserve my opinion upon that subject if it ever becomes necessary to decide it.

In each appeal :—

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 7, 1926.

Solicitor for the appellant : *Charles Wright.*

Solicitor for the respondents : *The Solicitor of Inland Revenue.*

(1) 1913 S. C. 16.

(2) [1923] 2 K. B. 447.

[PRIVY COUNCIL.]

J. C.* 1927 Jan. 18.

CORPORATION AGENCIES, LIMITED . APPELLANTS;

AND

HOME BANK OF CANADA . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Bankers—Liability—Cheques collected for Customer—Fraud of Customer—"Kiting"—Bankers without Knowledge of Fraud—Cheques paid out of Proceeds of other Frauds—Absence of Loss to Plaintiffs.

A by-law of the appellant company authorized its secretary-treasurer jointly with any director to sign cheques drawn upon its bank account. A series of cheques payable to one of the directors were fraudulently signed by the director jointly with the secretary-treasurer, and after endorsement were placed by the respondent bank to the credit of an account which the director had with them. The respondent bank collected the cheques from the appellants' bank in the usual course of business. In order that there should be to the credit of the appellants' account sufficient to meet each of the cheques, the director in each case fraudulently drew a cheque upon one of various other accounts upon which he had authority to draw, and paid it into the appellants' account. The appellants sued the respondent bank to recover the aggregate amount of the cheques collected by them:—

Held, that the action failed; first, because the respondent bank had not knowledge, either by the form of the cheques collected or otherwise, that they were improperly drawn on the appellants' account, and therefore could not recover the money as having been held by their bankers in trust for them; secondly, because the appellants had suffered no loss—the Board could not investigate the appellants' liability to persons not parties to the action in respect of the cheques placed to the appellants' credit.

John v. *Dodwell & Co.* [1918] A. C. 563 distinguished.

Judgment of the Supreme Court of Canada [1925] S. C. R. 706 affirmed.

APPEAL (No. 9 of 1926) by special leave from a judgment of the Supreme Court of Canada (September 25, 1925), affirming a judgment of the Superior Court of Quebec.

The action was brought by the appellants to recover from the respondents $205,960.37, being the aggregate of a series of ninety-four cheques drawn upon the appellants' banking

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

account between March and December, 1919, and collected by the respondent bank.

The facts appear fully from the judgment of the Judicial Committee.

The action was first tried by Maclennan J., who gave judgment for the plaintiffs for the sum claimed. On appeal to the Court of King's Bench the judgment was set aside, and a new trial ordered.

The new trial took place before Duclos J., who dismissed the action. By consent an appeal was taken per saltum to the Supreme Court of Canada, which Court affirmed the judgment of Duclos J. by a majority (Anglin C.J., Mignault and Rinfret JJ.; Duff and Newcombe JJ. dissenting).

The appeal is reported at [1925] S. C. R. 706.

1926. Dec. 10, 13, 14. *Millen K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellants.

Tilley K.C. and *Pritt* for the respondents.

1927. Jan. 18. The judgment of their Lordships was delivered by

LORD WRENBURY. The appellants, Corporation Agencies, Ld. (hereinafter called "the company"), are a limited company incorporated under the statutes of Canada. They carried on business in the city of Montreal as registrars and transfer agents for registering and transferring shares of the capital stock of certain commercial companies and agents and trustee and financial agents in reconstruction of certain companies. The Merchants' Bank of Canada were their bankers. The president of the company was one C. H. Cahan, Senior, one of His Majesty's counsel, a lawyer of wealth and position in Montreal. His son, C. H. Cahan, Junior, who was also one of His Majesty's counsel, was a director of the company. One B. F. Bowler was secretary-treasurer. The respondents, the Home Bank of Canada, were the bankers of Cahan, Junior. Between the plaintiff company and the defendant bank no relation, contractual, fiduciary or other, existed save such as arose from the transactions presently mentioned.

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This action was brought by the company against the defendant bank, claiming payment of a sum of $209,028.12 (afterwards corrected to $205,960.37), being the amount of ninety-four cheques amounting to the sum last above mentioned drawn upon the company's account with the Merchants' Bank of Canada, collected by the defendant bank through the Montreal Clearing House, and debited to the company's account with the Merchants' Bank. These ninety-four cheques were drawn at various dates between March 29, 1919, and December 20, 1919, and were as follows :—

Number of cheques.	Amounts.
	$
In March, 1919—One cheque . . .	500.00
,, April, 1919—Three cheques . . .	1,096.89
,, May, 1919—Nine cheques . . .	4,728.75
,, June, 1919—Seven cheques . .	9,680.00
,, July, 1919—One cheque . . .	3,500.00
,, August, 1919—Two cheques . .	1,850.00
,, September, 1919—Ten cheques . .	14,668.96
,, October, 1919—Twenty-one cheques .	46,445.00
,, November, 1919—Twenty-six cheques .	79,220.27
To December 20, 1919—Fourteen cheques .	44,270.50
Total—Ninety-four cheques .	$205,960.37

Cahan, Junior, who, as already stated, was a director of the company, was during 1919 engaged in very extensive speculative dealings in stocks and shares on his own private account, and he in fraud of the company made use of the company's account with the Merchants' Bank of Canada to assist his operations.

There is a device known in Canada as "kiting," which is described as follows : "Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque—that is, kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more." To

this Bowler, who was examined as a witness for the defendant bank, adds that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid, for which they are debited at the bank on which they are drawn.

During 1919 Cahan, Senior, was much engaged in business which took all his attention off the proceedings of the company. Cahan, Junior, and Bowler were substantially in complete control of the company's affairs, and it was in that state of things that the frauds of Cahan, Junior, which it is necessary to describe, were perpetrated.

The company's by-laws contained a by-law as follows: "54. Contracts and engagements on behalf of the company may be made, and cheques, bills of exchange, promissory notes, drafts and other negotiable paper may be made, drawn, accepted or endorsed by the secretary-treasurer acting jointly with the manager or with any director of the company, or by the manager acting jointly with any director of the company; or by any two directors acting together; provided, however, that cheques, drafts, bills of exchange, promissory notes or other negotiable paper may be endorsed for deposit only in the company's bank account by either the manager or the secretary-treasurer acting alone."

The following is a copy of the first of the cheques in question, that of March 29, 1919:—

"No. 6080. Montreal, Mar. 29, 1919.

Corporation Agencies, Limited.

Pay to the order of C. H. Cahan, Junior, $500.00 Five Hundred Dollars.

Corporation Agencies, Limited.

C. H. Cahan, Junior, Director.

B. F. Bowler, Secretary-Treasurer.

To the Merchants' Bank of Canada,

Montreal."

Of the ninety-four cheques, sixty-seven, amounting to $146,429.87, were drawn as above; six, amounting to $16,530.50, were similar, except that they were drawn payable

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to the order of the defendant bank. The rest, twenty-one in number, amounting to $43,000, were drawn in the same way and were made payable to Cahan, Junior, or to agents of his, or to bearer. A few of the cheques, some eighteen in number, were cashed over the counter. In all other cases the cheques were duly endorsed and were paid into Cahan Junior's account with the defendant bank, and were collected in ordinary course by the defendant bank through the Montreal clearing house from the Merchants' Bank of Canada. In the case of six cheques, " E. Wright, director," instead of B. F. Bowler, was the second signature in addition to that of Cahan, Junior. No importance is attributed to this fact.

On the night of December 26–27, 1919, Cahan, Junior, absconded, and his whereabouts were subsequently unknown. The facts of the frauds he had committed then came to light.

Cahan, Junior, held a power of attorney from his father to draw upon three banking accounts which his father had, in each of which there was a substantial credit balance. He had also power to draw on the banking accounts of several companies. He was thus in a position to draw on some twelve banking accounts or more and to carry on " kiting " operations, and did so to a very large extent. The general effect of his operations may be described as follows : He and Bowler (who was throughout a party to his proceedings) drew a cheque on the Merchants' Bank of Canada. Cahan, Junior, paid it into his own private account at the defendant bank. At the moment when they drew that cheque there was in most cases no sufficient balance at the Merchants' Bank to meet it. But on the same day Cahan, Junior, paid into that account a cheque drawn by him on some of the other accounts on which he had power to draw, with the result that the plaintiffs' account with the Merchants' Bank was or at any rate became by the end of the day in credit to an amount sufficient to meet the cheque in his favour. An illustration may be given by taking the case of the first cheque, that of March 29, 1919, for $500. On March 29 the credit balance at the Merchants' Bank was only $61.74.

The cheque of March 29 was cleared on March 31. On March 29 $270 and on March 31 $250 were paid by Cahan, Junior, into the credit of the account, with the result that on March 31 there was enough to meet the cheque for $500 and to leave a credit balance of $81.74. This is a fair sample of what was done throughout. The ninety-four cheques were never met by moneys of the plaintiffs. Cahan, Junior, simply paid in and drew out money which he was obtaining by fraud from his father's accounts or the other accounts which have been already mentioned. The plaintiffs' account with the Merchants' Bank was never overdrawn except on one or two occasions to very small amounts. The cheques that came in and went out always offset each other. From March to December, 1919, no more than $5,890.34 was paid into the Merchants' Bank and $8,402.35 drawn out in respect of the regular business of the company. The difference between these two sums came out of the funds irregularly deposited by Cahan, Junior.

During the whole of that time the company was practically dormant. All the rest of the payments into the account and the whole of the amount which was by the ninety-four cheques drawn out of the account had nothing to do with the company's business or the company's moneys. The trial judge found as a fact that none of the ninety-four cheques were paid out of the company's funds.

Having thus sketched the facts upon which the question arises, their Lordships go on to consider what is the law applicable to the case. The question here is whether the defendants had notice or knowledge. This is question of fact. In *John* v. *Dodwell & Co.* (1), Lord Haldane, in delivering the judgment of this Board, said: "When an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is . . . . in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a

(1) [1918] A. C. 563, 569, 570.

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transmitted fiduciary obligation to account for it to the principal." And again, "If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents." In *John* v. *Dodwell & Co.* (1), Williams, the manager for Dodwell & Co., who was authorized by Dodwell & Co., the plaintiffs (respondents), to draw, and who drew the cheques on the plaintiffs' account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the present case, on knowledge. If there was no knowledge, it has no application.

By virtue of art. 54 of the company's by-laws Cahan, Junior, as a director, and Bowler as secretary-treasurer, were authorized to draw on the company's account at the Merchants' Bank of Canada, and they did so. Maclennan J., the judge before whom the action was first tried, considered that the form of the cheques on their face was notice of the fact that Cahan, Junior, was appropriating to his own use the company's moneys. Duff and Newcombe JJ. (the minority judges on the appeal) were of the same opinion. Their words are "having notice, of which the cheques themselves were prima facie evidence, that Cahan, Junior, the defendants' endorser, was not entitled to the cheques." And again, "The cheque on its face is evidence of the absence of authority for the exercise of his powers for a purpose which is incompetent to him." Their Lordships do not agree. In their opinion, the majority in the Supreme Court were right in holding that the form of the cheques did not give notice and that the defendants had not notice.

For by way of illustration, take again the first cheque, that for $500, of March 29, 1919. When Cahan, Junior, paid that cheque into his account at the defendants' bank, suppose the bank had asked, "For what is this cheque given?" would he have been bound to answer? The cheque

(1) [1918] A. C. 563, 569, 570.

might have been for salary or for a sum due to Cahan, Junior, on any other account. The defendant bank had no duty to inquire as to the obligation in respect of which it was given. They would in ordinary course of business take the cheque and if on presentation to the Merchants' Bank payment were refused, they would debit their customer with the amount.

During April three like cheques for $300, $498.74 and $298.15, were endorsed and handed to the defendant bank by Cahan, Junior. The practice of the Merchants' Bank was not to issue a pass-book, but to render monthly accounts. Such monthly accounts were duly rendered for March and April, 1919, to the company. These contained the cheques above referred to. Thus the plaintiffs knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan, Junior, were being accepted by the company as being on their face in order. And so matters went on during the subsequent months, and a fortiori the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the company. The company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so, and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary.

Moreover, the fact was that the plaintiffs' moneys were not being appropriated and applied by Cahan, Junior, at all. His father's moneys and the moneys of the various companies on whose accounts he was entitled to draw and did draw were no doubt being misappropriated, but so far as the plaintiffs were concerned Cahan, Junior, was doing no more than paying into their account moneys which did not belong to them and drawing out to the like amount moneys with which the company, in fact, had no concern. Neither the payments into nor the drawings out of the company's account were authorized acts. The company cannot repudiate the

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one and take the benefit of the other. They are, in fact, not concerned with either. The plaintiffs lost nothing by the "kiting" transactions. If they now recovered the $205,960.37 from the defendant bank they would be making that sum as a profit if they kept it, and if they did not keep it, but were compelled by action brought by those whom Cahan, Junior, defrauded to pay it over to Cahan, Senior, or others whom Cahan, Junior, defrauded, they would be giving effect to rights whose existence the Board cannot in this proceeding investigate or determine, and with which in this proceeding they have nothing to do, for Cahan, Senior, and the companies concerned are not parties to this litigation.

Upon both grounds—namely, that the defendant bank had not notice or knowledge and that, in fact, the company have sustained no loss—their Lordships are of opinion that the majority in the Supreme Court are right, and that this appeal must be dismissed with costs.

They will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

DOUGHTY . . . . . APPELLANT;

AND

COMMISSIONER OF TAXES . . . . RESPONDENT.

J. C.*
1927
Jan. 21.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Revenue—Income Tax—Profits of Business—Sale of Business to Company—Sale as going Concern—Increased Value of Stock—Book Entries—Land and Income Tax Act, 1916 (*No.* 5 *of* 1916, *New Zealand*), *s.* 85.

In 1920 two partners carrying on business in New Zealand as general merchants and drapers sold the partnership business to a limited company in which they became the only shareholders. The sale was of the entire assets, including goodwill, the consideration being fully paid shares, and an agreement by the company to discharge all the liabilities. The nominal value of the shares being more than the sum to the credit of the capital account of the partnership in its last balance sheet, a new balance sheet was prepared showing a larger value for the stock in trade. The Commissioner of Taxes treated the increase in value so shown as a profit on the sale of the stock in trade, and assessed the appellant upon it for income tax under the Land and Income Tax Act, 1916, of New Zealand, which imposes the tax on "all profits or gains derived from any business":—

Held, that the assessment was wrongly made, since (1.) if the transaction was to be treated as a sale, there was no separate sale of the stock, and no valuation of it as an item forming part of the aggregate sold, and (2.) the transaction was a mere readjustment of the business position of the partners, resulting in no profit; a mere bookkeeping entry could not be taken as conclusive evidence of a profit.

Craig (*Kilmarnock*), *Ld.* v. *Inland Revenue*, 1914 S. C. 338 approved.

Judgment of the Court of Appeal [1926] N. Z. L. R. 279 reversed.

APPEAL (No. 92 of 1926) from a judgment of the Court of Appeal of New Zealand (March 31, 1926) reversing a judgment of Stout C.J.

The question in the present appeal was whether the appellant was assessable for income tax for the year ending March 31, 1921, under the Land and Income Tax Act, 1916, of New Zealand. The matter came before the Supreme Court

* *Present:* VISCOUNT CAVE L.C., LORD SHAW, LORD WRENBURY, LORD PHILLIMORE, and LORD BLANESBURGH.

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of New Zealand by a case stated under the Act for the opinion of that Court.

Stout C.J. disallowed the assessment, but his judgment was reversed by the Court of Appeal (Sim, Stringer and MacGregor JJ.). The judgments in both Courts are reported at [1926] N. Z. L. R. 279.

The assessment was in respect of a profit claimed by the Commissioner of Taxes to have been made by the appellant and his partner on the sale of their stock in trade when in 1920 their business of general merchants and drapers was sold to a limited company in which they were the only shareholders. The facts are stated in the judgment of the Judicial Committee.

The Land and Income Tax Act, 1916, by s. 85 provides that assessable income for the purpose of the Act shall be deemed to include "all profits or gains derived from any business."

1926. Dec. 2, 3. *Latter K.C.*, *Myers K.C.* and *Cyril King* for the appellant.

Farwell K.C., *F. O. Langley* and *Joan Clarkson* for the respondent.

[In addition to cases mentioned in the judgment of the Judicial Committee reference was made (on behalf of the appellant) to *J. & R. O'Kane & Co.* v. *Inland Revenue Commissioners* (1) and *Edwards* v. *Old Bushmills Distillery Co.* (2)]

1927. Jan. 21. The judgment of their Lordships was delivered by

LORD PHILLIMORE. This is an appeal from the judgment of the Court of Appeal of New Zealand reversing the decision of Stout C.J. on an application by the Commissioner of Taxes seeking to assess the appellant to income tax in the sum of 6010*l.* in respect of income for the year ending on March 31, 1921.

On the proceedings taken in respect of this assessment a case was stated by the Commissioner which, according

(1) (1922) 126 L. T. 707. (2) [1926] N. I. 155; 10 Tax Cas. 285.

to the practice in New Zealand, was traversable and was accordingly traversed by the present appellant in his answer, and the matter came in the first instance before a magistrate and was decided in favour of the Commissioner. His decision was, however, appealable, both on grounds of fact and law, to a judge of the High Court, in this case Stout C.J. The decision of the Chief Justice is final on fact, but not on a matter of law.

The circumstances are these. The appellant and one Arthur John George carried on business at Wellington as wholesale soft goods merchants and drapers in partnership. On June 25, 1920, they converted their partnership into a private limited company, of which they were the only two shareholders. The company had a nominal capital of 175,000*l.* in 1*l.* shares, 100,000 of which were ordinary, 25,000 were A preference shares and 50,000 were B preference shares.

The arrangement, which was embodied in an agreement dated June 25, 1920, was that the partners as vendors should sell to the company and the company should purchase as from January 20 then past, the goodwill of the business, the leaseholds, plant, machinery, book debts, the benefit of pending contracts, all cash bills and notes, and generally all property to which the vendors were entitled in connection with the business.

Part of the consideration for the sale was the allotment to the vendors of 76,000*l.* paid up shares, 30,000*l.* ordinary shares to George and 30,000*l.* to the appellant, and 16,000*l.* B preference shares to George. The residue of the consideration was the undertaking by the company to satisfy all the liabilities and engagements of the firm.

The vendors contracted not to carry on the business of a draper independently of the company, and they stated that they had in certain proportions subscribed the memorandum of association for all the 175,000 shares in the company, each thus according to his proportion rendering himself liable to that extent for the debts of the company.

J. C. 1927 DOUGHTY v. COMMISSIONER OF TAXES.

The last balance sheet of the old partnership stood as follows :—

Liabilities.	£	s.	d.	Assets.	£	s.	d.
Capital account	48,774	12	0	Furniture and fittings . .	513	18	4
Sundry creditors	10,366	17	5	Cash at bank .	106	11	3
Deposits at interest . .	2,238	7	6	Cash on hand and customs .	432	7	11
Bills payable current . .	36,053	12	2	Sundry debtors	45,151	17	0
				Bills receivable current . .	5,896	3	3
				War loans .	1,974	12	6
				Stock in hand .	43,357	18	10
	£97,433	9	1		£97,433	9	1

This should be corrected in one respect, as 7800*l.* was due for unpaid income tax, thereby reducing the capital account from 48,774*l.* 12*s.* to 40,974*l.* 12*s.*

The partners having fixed the price at which they sold, if it could be called a sale, their business to the company, it remained to adjust the figures on the last balance sheet in accordance with this arrangement, 76,000*l.* being evidently more than the sum standing to the credit of the capital account; and, in order to effect this, the item on the asset side stock, "in hand 43,357*l.* 18*s.* 10*d.*," was replaced by an item "stock and goodwill 78,383*l.* 6*s.* 10*d.*"

It appears from the evidence of the accountant who made out these accounts that he suggested that the figure for goodwill might be taken as 20,000*l.*, and that this view was accepted by the outgoing partners. This left as the residue of the item 58,383*l.* 6*s.* 10*d.*, or 15,025*l.* 8*s.* as the difference between the value of the stock in trade as shown in the partners' last balance sheet and the value of the stock in trade as it might be deemed to be taken over by the company; and the Commissioner for Taxes claimed that this was a profit and to levy income tax upon it.

By the law of New Zealand each partner is severally liable

to tax in respect of his share of the profits of a partnership, and the appellant Doughty's share of this supposed profit was fixed at 6010*l*., in respect of which he was assessed to income tax as already stated.

The appellant puts his case in two ways. He says : (1.) that if the transaction is to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold, and (2.) that there was no sale at all, but merely a readjustment of the business position of the two partners, and an application for their benefit of the law of New Zealand allowing the formation of private companies with limited liability.

Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.

It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business or a sheep rearing business, where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connection with the sale and winding up of the business gives no indication of the profit (if any) arising from income ; and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and

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smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

But upon the evidence in this case, it would appear that no such separate sale was effected. It was a transfer of all the assets of the partnership for 76,000 shares, some preference, some ordinary, all taken at their face value of 1*l.* each, with an obligation, measured by a number of shares not paid up, to discharge the liabilities of the partnership. If these several items were not worth 76,000*l.*, then the shares were not worth their face value. Then as the vendors were the takers of the shares, they would gain nothing. They may have estimated in June that their stock was in the previous January worth more than the sum at which it had been put in their balance sheet, but they did not, by so estimating it, make it more.

So far as the matter is a question of fact, the judgment of the Chief Justice was conclusive, and if the question be to any extent a question of law, their Lordships desire to express their agreement with the conclusion drawn by the Chief Justice.

The authorities to which their Lordships have been referred, when carefully examined, show where the distinction is to be drawn between capital sales and sales producing income.

Some of these authorities are cases in which a company is dealing with land. In *Commissioner of Taxes* v. *Miramar Land Co.* (1) a company was formed for the purpose of dealing in land; and it acquired one property, of which it immediately sold a small portion, and a few months afterwards sold the rest in one block, and then it went into liquidation. It was held that the business of the company was one of dealing in land, and that the profit ultimately

(1) (1907) 26 N. Z. L. R. 723.

acquired was none the less a profit upon dealing, because when the last part of the profit was acquired, the company ceased from carrying on business.

So in *Californian Copper Syndicate* v. *Inland Revenue* (1), a company formed to buy copper bearing land in county California, bought the land for cash, improved it, and then resold it in two portions to the Fresno Co. for 300,000 shares of the nominal value of 1*l.* each. The whole capital of the Fresno Co. was 400,000 shares, of which 75,000 were subscribed for in cash, 300,000 went to the Californian Co., and 25,000 were unallotted. It was held that the transaction was a sale in the line of the company's business, resulting in a profit, and not a mere change in the mode of investment, and therefore that the profit was taxable to income tax. In that case the Primary Commissioners said that it seemed clear to them that the property had been bought in order to be sold.

On the other hand, in *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (2) this case was distinguished, and the particular transaction in this latter case was held to be a case of appreciation of capital and not one resulting in a profit taxable to income tax. The facts were that the company was formed to purchase land in Malay and develop it by cultivating rubber trees. Two estates were bought, and much planting had been done ; but the capital was insufficient, and the undertaking was (after existing for rather more than a year) sold to a second company (the old company being wound up). The consideration for the sale was 2500*l.* in cash and 36,000 1*l.* shares of the new company. It was held that the first company was not formed to deal in land as a business, and that this was a case of realization of an investment.

Then there are some difficult cases where the business is anent breeding stock. In the Australian case of *Commissioner of Taxation for Western Australia* v. *Newman* (3), a pastoralist put an end to his business and sold the whole station with

(1) (1904) 6 F. 894 ; 5 Tax Cas. 159. (2) (1910) 5 Tax Cas. 658.
(3) (1921) 29 C. L. R. 484.

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stock and plant as a going concern, and it was held that the transaction was not the carrying on of a business but the winding up of a business, and that the profit made on the winding up was not a profit taxable as income; and in another Australian case, *Hickman* v. *Federal Commissioner of Taxation* (1), another pastoralist who put an end to his business and sold his property, with all the improvements and the cattle upon it, was held not to be liable to the war time profits tax in respect of the moneys realized by the sale of his cattle, even though in that case a separate price was realized for the cattle. It is stated in the judgment of Stout C.J. that these cases have been since covered by legislation.

In the case of *Anson* v. *Commissioner of Taxes* (2) the view of the Court was that Anson, who carried on a sheep farm, was carrying it on as a dealer in buying and selling sheep, and the Court said: "Every individual animal (with the negligible exception of the rams kept for breeding purposes) is part of the taxpayers' stock in trade. It is true that he does not, while his business is carried on, sell all his stock in trade at once; he always retains a part thereof. But in this respect his business is not different from that of other merchants. In the case of most trades it is only when the business is wound up or transferred that the entire stock in trade is disposed of. Normally a trader retains and carries over to the succeeding year a standard quantity of stock. But this permanent quality does not for that reason cease to be stock in trade. . . . ." This being so in the view of the Court, it did not make any difference whether the stock in trade was sold progressively or all at once by way of clearing sale or otherwise in connection with a transfer or a winding up of the business. Whether his profit was derived from a single sale of all his stock in trade at once, or from repeated sales in the ordinary way of his business, his profit was taxable income, and was assessable accordingly.

In that case the item of profit was arrived at by taking the value of the stock as it stood in Dr. Anson's books for

(1) (1922) 31 C. L. R. 232. (2) [1922] N. Z. L. R. 330.

one year and comparing it with the same item of value in the previous year, and it seems to have been assumed that this particular piece of farming could be treated by itself, and that all the items of buying and selling of animals and profits, if any, from sale of wool, with the per contra items of wages and fodder and suchlike, could be taken as balancing each other, so that the difference between the values of the sheep stock in the two years represented the actual profit.

It would be difficult to arrive at the profit in this way if it were the case of a farmer in England; but the trade of a pastoralist is one with which the New Zealand Courts would be familiar, and which it would be more easy for the New Zealand judges than for their Lordships to appreciate.

The reported cases on this branch of income tax law are so involved in detail that it is not always easy to see on which side of the line they fall. The case of *Commissioner of Taxes* v. *Melbourne Trust* (1) is an authority for holding that in certain cases what seems like a distribution of assets is in truth an application of profits. The case, however, nearest the present is that of *J. & M. Craig* (*Kilmarnock*), *Ld.* v. *Inland Revenue.* (2) There, on a transference from one company to another, one-third of the value of each item, other than stock in trade, as it stood in the books of the selling company, was treated as its value for transfer purposes, and the balance of a slump price, which, with an undertaking to discharge liabilities, formed the consideration, was inferentially attributable to the stock. It was held, however, in that case that no sum could be pitched upon as the actual price of the stock, and no claim to assess a profit could be based upon such a foundation.

Their Lordships would repeat that if a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income tax; but their view of the facts (if it be open to them to consider the facts) is the same as that of Stout C.J.—that is, that this was a slump transaction.

(1) [1914] A. C. 1001. (2) 1914 S. C. 338.

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The other ground on which the appellant's case may rest is that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners. The case of *Craig* (*Kilmarnock*) (1) just referred to is an authority for saying that the Crown is not entitled to take a mere bookkeeping entry as conclusive evidence of the existence of a profit. The two partners made no money by the mere process of having their stock in trade valued at a high rate when they transferred to a company consisting of their two selves.

If they overestimated the value of the stock the value of the several shares became less. The capital of the company would be to this extent watered. As already observed, they could not, by overestimating the value of the assets, make them more.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment of Stout C.J. should be restored, and that the appellants should have the costs below and of this appeal.

Solicitors for appellant: *Shaen, Roscoe, Massey & Co.*

Solicitors for respondent: *Mackrell, Maton, Godley & Quincey.*

(1) 1914 S. C. 338.

[PRIVY COUNCIL.]

WALSH . . . . . APPELLANT;

AND

THE CROWN . . . . . RESPONDENT.

J. C.*
1927
Jan. 18.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia—Public Service—Education Department—Superannuation—Discretion of Crown—Superannuation Act, 1871 (35 *Vict. No.* 7, *W. A.*), *ss.* 1, 12—*Public Service Act*, 1904 (*No.* 41 *of* 1904, *W. A.*), *ss.* 5, 10, 52, 83—*Public Service Appeal Board Act*, 1920 (*No.* 14 *of* 1920), *ss.* 3 (*b*), 6, 10.

Members of the teaching staff of the Education Department of Western Australia qualified under the Superannuation Act, 1871 (W. A.), to receive superannuation allowances are not deprived of the privilege by s. 83 of the Public Services Act, 1904 (W. A.).

Under ss. 1 and 12 of the Act of 1871, however, the privilege is dependent upon the discretion and bounty of the Crown, exercised by the Governor in Executive Council, and that is still so notwithstanding the provisions of the Public Service Act, 1904 (W. A.), and the Public Service Appeal Board Act, 1920 (W. A.). When the Appeal Board reports to the Governor on any such point as is specified in s. 6, sub-s. 4, of the Act of 1920, as to qualification or length of service, the decision so reported is binding upon the Crown under s. 10, but there are no words in the Act which take away the discretion of the Crown under the Act of 1871 to grant or withhold the privilege.

Laffer v. *Minister for Justice for Western Australia* (1924) 35 C. L. R. 325 approved.

Judgment of the Supreme Court of Western Australia affirmed.

APPEAL (No. 74 of 1926) from a judgment of the Supreme Court of Western Australia (December 17, 1925), dismissing the appellant's petition under the Crown Suits Act, 1898, of that State.

The appellant was a member of the teaching staff of the Education Department of Western Australia. By a petition under the Act above mentioned he claimed a declaration that he was entitled to certain superannuation benefits upon his retiring.

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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The appeal depended upon the construction of provisions of the following Acts of Western Australia: the Superannuation Act, 1871; the Public Service Act, 1904; the Public Service Appeal Board Act, 1920.

The relevant statutory provisions are set out, or sufficiently stated, in the judgment of the Judicial Committee.

The trial judge (Draper J.) dismissed the petition following *Laffer* v. *Minister of Justice for Western Australia* (1), by which he was bound.

1926. Nov. 29, 30. *Keenan K.C.* and *H. E. Robertson* for the appellant.

Pritt and *F. L. Moss* for the Crown.

1927. Jan. 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The question which their Lordships have to consider in this appeal, brought from a judgment of the Supreme Court of Western Australia, is whether the appellant, who was a member of the teaching staff of the Education Department of the State, was entitled to a superannuation allowance. His claim had been disallowed by the Governor in Executive Council. It was considered that the point, that a free discretion was open to the Governor in Council, had been determined by a judgment of the High Court of Australia, and the question now raised in independent proceedings was raised in order to have the correctness of that decision reviewed by the Judicial Committee of the Privy Council.

In May, 1922, when about to retire from his employment, the appellant applied for a superannuation allowance. His application was disallowed by the Director of Education on the suggested ground that no provision had been made for any retiring allowance to teachers who had joined the service since April 17, 1905, the date when s. 83 of the Public Service Act, 1904, came into operation. The appellant had joined in 1907. In February, 1923,

(1) 35 C. L. R. 325.

the appellant had formally applied for a superannuation allowance.

In order to understand the question raised it is necessary to refer to the provisions of the relevant statutes. The Superannuation Act of 1871, passed by the Legislature of Western Australia, provides, subject to exceptions which are not relevant, that persons who have served in an established capacity in the permanent Civil Service should be entitled to certain superannuation allowances. But by a proviso to s. 1, which grants such allowances, it is enacted: "that if any question should arise in any department of the public service as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final."

Sect. 12 provides that: "Nothing in this Act contained shall extend to or be construed to extend, to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Governor of the power and authority to dismiss any person from the public service without compensation."

The Public Service Act, 1904, enacts, by s. 5, that the Act, unless otherwise provided, is not to apply to the teaching staff of the Education Department. By s. 6 it enables the Governor to appoint a Public Service Commissioner, who is, under s. 9, to supervise the public service and to report proposals for improvement and as to redundancies to the Governor. Sect. 83 enacts: "The provisions of the Superannuation Act shall not apply to any person appointed to the public service after the commencement of this Act; and nothing in this Act contained shall be deemed to confer on any person whomsoever any right or privilege under the said Act." Sect. 10 provides that any officer dissatisfied with any proposal of the Commissioner, either particular or general in regard to grade affecting him, or to the classification of the work performed by or assigned to him, may appeal to an Appeal Board constituted as thereinafter provided. By s. 51 the Appeal Board, of which the

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Commissioner is to be chairman, is constituted, and, by s. 52, is to inquire into every appeal, and its decision is to be "reported to the Governor and shall be final." There is, in their Lordships' opinion, nothing in the Act which places questions as to the grant of superannuation allowances within the class of matters as to which the Commissioner is given jurisdiction. Nor is such jurisdiction by the terms of the statute entrusted to the Appeal Board.

In the case of *Laffer* v. *Minister of Justice for Western Australia* (1), which was analogous in its facts to the present case, and which went on appeal to the High Court of Australia, it was decided by a majority, Gavan Duffy and Starke JJ., Isaacs A.C.J. dissenting, affirming Northmore J. of the Supreme Court of Western Australia, that the finding of the Board that a person is qualified under the Superannuation Act to receive superannuation allowance does not, as matter of law, affect the right of the Governor in Council to refuse, in the exercise of his discretion, the grant of such an allowance. All the three judges of the High Court agreed in holding that s. 83 of the Act for the Regulation of the Public Service of 1904 had no application to the teaching staff of the Education Department. With this conclusion their Lordships agree for the reasons given by the High Court. But the real question, which was the subject of the dissenting judgment of Isaacs J., arises under a later Act, the Public Service Appeal Board Act, 1920, passed by the Legislature of Western Australia in that year. This Act expressly applies to the teaching staff of the Education Department, and provides that if an appeal relates to matters with which the teaching staff of the Education Department only is concerned the Board is to consist of a judge of the Supreme Court, who is to be chairman, of one member to be appointed by the Governor, and of one member to be elected by members of the State School Teachers' Union of Western Australia. The jurisdiction of the Board so constituted is, by s. 6, to hear and determine (inter alia) any appeal by a public servant or class of public servants, from the Public Service

(1) 35 C. L. R. 325.

Commissioner or the Minister of Education, in respect of the classification, reclassification, salary or allowances, of such public servant or class of public servants, or his or its office or officers, or any decision involving the interpretation or application of the provisions of any Act or regulation governing the service of such public servant or class of public servants.

By s. 6, sub-s. 4, it is enacted that if any question shall arise, or at the commencement of the Act is pending, in any department of the public service, as to the qualification of any person claiming a superannuation allowance under s. 1 of the Superannuation Act, it shall be referred to the Board, whose decision shall be final. By s. 10 the decision of the Board is in each case to be reported in writing by the Board to the Governor, and is to be final, and effect is to be given to every such decision.

In their Lordships' opinion, if the Superannuation Act of 1871 can be taken by itself, the plain meaning of the proviso to s. 1 and of s. 12 is that the Governor in Council has a discretionary power to reject absolutely any claim made by any person for superannuation allowance, and that the exercise of his discretion in making such a rejection is not under the control of any Court.

They are unable to accept the more restricted construction put on the Act itself by Isaacs A.C.J. They agree with Gavan Duffy and Starke JJ. in thinking the true view is that the Act confers an authority on the Crown "to grant superannuation or retiring allowances in certain cases, but makes the grant dependent on the discretion and bounty of the Crown," if the claim is questioned. Do the subsequent statutes affect this conclusion? Their Lordships think that they do not. Sect. 10 of the Public Service Act of 1904 does not appear to them to restrict this power of the Crown, nor do they think that s. 52 does, inasmuch as its scope is restricted to questions arising by way of appeal from the decisions of the Commissioner on the matters referred to in s. 10, which do not extend so far.

The provisions of the Public Service Appeal Board Act, 1920, are not so simple, but in their Lordships' view they do

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not really modify the principle. They bring in (s. 3 (*b*)) the staff of the Education Department, and they give the Board jurisdiction to determine any appeal from the Commissioner or the Minister of Education in respect of classification, reclassification, salary or allowances, or of the interpretation or application of any Act or regulation governing service: s. 6, sub-s. 1. They provide (s. 6, sub-s. 4) that if any question arises as to the qualification of a person claiming a superannuation allowance under s. 1 of the Act of 1871, it is to be referred to the Board, whose decision is to be final. Sect. 10 provides that the decision of the Board is to be reported in writing to the Governor, and is to be final and to have effect. The Acts of 1871 and of 1904 are to be construed, subject to these provisions. No doubt when the Board reports to the Governor on any such point as is specified in s. 6, sub-s. 4, as to qualification or length of service, the decision so reported is binding on the Crown, but there are no words which take away the discretion of the Crown to grant or withhold conferred by the Act of 1871. It may be, as Isaacs J. held, remarkable that the statutes of 1904 and 1920 should leave this discretion intact. But the words employed appear to their Lordships clear, and with the reasons for the policy adopted in using them, no Court of law has any concern. The conclusion on the point of construction to which the Judicial Committee have come is the same as that of the majority in the *Laffer* case. (1)

The conclusion disposes of the appeal, and their Lordships will humbly advise His Majesty that it should he dismissed with costs.

Solicitors for appellant: *Slaughter & May.*
Solicitor for respondent: *M. L. Moss.*

(1) 35 C. L. R. 325.

[PRIVY COUNCIL.]

COLONIAL SUGAR REFINING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

J. C.* 1927 *Jan.* 18.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Victoria—Construction of Act—Expropriation without Compensation—Melbourne Harbour Trust—Vesting Act—Previous Title by Limitation—Wharf on Piles in navigable River—Nature of Title—Melbourne Harbour Trust Act, 1915 (*No.* 2697 *Vict.*), *ss.* 2, 11, 46—*Acts Interpretation Act,* 1915 (*No.* 2609 *Vict.*), *s.* 6, *sub-s.* 2; *s.* 33—*Real Property Act,* 1915 (*No.* 2719, *Vict.*), *ss.* 18, 43.

Before 1912 the appellants for a period of fifteen years had continuous use and occupation of a wharf and two strips of land within the statutory metes and bounds of Melbourne Harbour, and in consequence the title thereto of the Harbour Commissioners became extinguished under the Real Property Act, 1915 (Vict.). The wharf was constructed on piles driven into the bed and foreshore of a navigable river.

The Melbourne Harbour Trust Act, 1915, which was part of a general consolidation of statutes, repealed harbour vesting Acts of 1890 and 1912, and by s. 11 vested in the respondent Commissioners all the property which had vested in the Commissioners in 1912; s. 46 declared that the harbour within the specified metes and bounds should "continue to be vested in" the respondents upon trust for the statutory purposes.

The appellants brought an action against the respondents claiming among other things a declaration that they were entitled to the two strips of land and the wharf by virtue of the limitation provisions above referred to:—

Held—applying the principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so was expressed in clear and unambiguous terms, and giving effect to the provisions of the Acts Interpretation Act, 1915 (Vict.), as to rights and liabilities under repealed Acts—that the vesting of the harbour in the respondents was subject to the title which the appellants had acquired by limitation; and accordingly that it should be declared that the appellants were entitled in fee simple to the two strips of land, also to that part of the bed and foreshore which was the site of the wharf,

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* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT DUNEDIN, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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and to the wharf, but so that they should not be at liberty to increase the obstruction existing to the flow of the water beneath the wharf. Judgment of the High Court of Australia 36 C. L. R. 230 reversed.

APPEAL and CROSS-APPEAL (No. 80 of 1926) by special leave from a judgment of the High Court of Australia (June 9, 1925) varying a judgment of the Supreme Court of Victoria.

The action was brought by the appellants in the Supreme Court against the respondents, claiming a declaration of their title in fee simple to two strips of land and a wharf situated within the statutory metes and bounds of Melbourne harbour, alternatively that they were entitled perpetually to exclusive use and occupation; a declaration that they were entitled to exercise the rights of riparian owners over one of the strips, consisting of reclaimed land, and the wharf; they also claimed an injunction and other relief.

The respondents counterclaimed for: (*a*) possession of the strips of land and of all wharves, piers and erections thereon or abutting thereon in the east, and (*b*) a declaration that the said strips of land and wharves, piers and erections were part of the Port of Melbourne and vested in, and subject to the exclusive control and management of, the Harbour Trust.

The facts are stated in the judgment of the Judicial Committee.

The trial judge (Mann J.) by his judgment, declared: (1.) that the company was entitled in fee simple to the northern and southern strips; (2.) that it was entitled to perpetual use and occupation of the wharf subject to the Harbour Trust's statutory powers of management and control and subject to all public rights in or relating to the said river, and (3.) that it was entitled, as owner of the adjoining land, to a right of easement over that portion of the river bed lying under the wharf to have and keep the said wharf erected upon piles in the said portion of the bed in such manner as to offer no further obstruction than at present exists to the flow of the water beneath the wharf. He also granted an injunction as prayed, and dismissed the counterclaim.

The Harbour Commissioners appealed to the High Court of Australia, which discharged the judgment of Mann J., and in lieu thereof gave judgment for the Harbour Commissioners on the counterclaim, making a declaration substantially as asked, and ordering possession to be delivered accordingly. To that extent the judgment of the High Court was unanimous. By a majority, however (Isaacs and Rich JJ.; Higgins J. dissenting), the Court made a declaration that the company was entitled, subject to the statutory powers of the Harbour Trust, to exercise the rights of a riparian owner in respect of the River Yarra over the strips of land and over the wharf so long as the same should remain. Higgins J. considered that the company had lost any riparian rights which it might once have possessed, but otherwise concurred in the views of the majority. The appeal is reported at 36 C. L. R. 230.

The Judicial Committee granted special leave to appeal and to cross-appeal.

1926. Nov. 16, 18, 19, 22. *Maugham K.C.*, *Dighton Pollock* and *J. M. Parry* for the appellant company. The respondents' claim was in substance one to eject the company, the onus was therefore on the respondents. The appellants are entitled to the land claimed, or a large portion of it, as being part of a Crown grant in 1850 to the appellants' predecessor in title as amended in 1890. It was not within the metes and bounds of what was vested in the Commissioners by the Harbour Act of 1877. So far as the land was not within the grant, it was land filled in and covered with buildings and works by the consent of the Commissioners. There must therefore be presumed an irrevocable licence to use it for the purposes of the appellants' business, on the principle of *Plimmer* v. *Mayor of Wellington* (1) and *Attorney-General for Southern Nigeria* v. *Holt & Co.* (2) On similar grounds the appellants have a perpetual licence to use and occupy the wharf. But in any case, both as to the land and the wharf, the appellants acquired a title by limitation under

(1) (1884) 9 App. Cas. 699. (2) [1915] A. C. 599.

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the Real Property Act, 1915 (Vict.), ss. 18, 43. On the true construction of the Melbourne Harbour Trust Act, 1915 (Vict.), the title so acquired was not taken away. The High Court did not give sufficient weight to the Acts Interpretation Act, 1915 (Vict.), nor to the fact that the construction they adopted would result in the appellants being deprived without compensation of property to which thay had acquired a valid title. The appellants' rights were preserved by s. 47 of the Harbour Trust Act of 1877, and similar sections in the subsequent Acts. With regard to the cross-appeal the appellants have done nothing to deprive themselves of their rights as riparian owners, and on that point the judgments below are right.

Latham K.C. (*Attorney-General for Australia*), *W. A. Greene K.C.* and *Nesbitt* for the respondents. The appellants obtained no title to the land now in dispute under the Crown grant of 1850, or the subsequent certificates of title. The licence to the appellants to use the land was of a purely temporary nature; the Commissioners were precluded by statute from granting a permanent licence; further the Crown is not bound by unauthorized acts of acquiescence of its officers: *Ontario Mining Co.* v. *Seybold.* (1) The cases relied on for the appellants are consequently distinguishable; further *Holt's* case (2) turned on the duty of the Crown to protect the shore from erosion. Even if the appellants had acquired a title by limitation, the land and wharf was vested in the respondents by the Harbour Act of 1915, s. 46. But the appellants obtained no title by limitation, since the respondents do not claim through the previous Commissioners so as to make s. 19 of the Real Property Act, 1915, applicable. On the cross-appeal: the appellants by their own reclamations had shut off their property from the stream, and thereby lost any riparian rights which they possessed. Further, the Act vested the harbour as defined in the respondents and made it subject to their exclusive control and management; they had power therefore to prevent the exercise of any riparian rights.

(1) [1903] A. C. 73, 84. (2) [1915] A. C. 599.

[Reference was made also to *Marshall* v. *Ulleswater Steam Navigation Co.* (1); *Attorney-General* v. *Terry* (2); and *Lyon* v. *Fishmongers' Co.* (3)]

Maugham K.C. replied.

1927. Jan. 18. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal brought by special leave of His Majesty in Council from an order of the High Court of Australia in favour of the respondents, reversing an order of the Supreme Court of Victoria in favour of the appellants.

The appellants are the owners of a large sugar-refining factory on the banks of the River Yarra, a tidal navigable river within the limits of the harbour of Melbourne. The respondents are the Melbourne Harbour Trust Commissioners, in whom the Port of Melbourne, as described in the statutes under which they are constituted, is vested.

The question in the appeal concerns the title to: (1.) a wharf on the west bank of the River Yarra; (2.) a strip of land (hereinafter called "the northern strip") lying to the west of the wharf; and (3.) a strip of land (hereinafter called "the southern strip") lying to the west of another wharf, recently leased to the appellants by the respondents for a term which has now expired and as to which no question arises.

In the opinion of their Lordships, the real question to be decided in this appeal is whether under the circumstances of the present case the title of the respondents to the strips of land and the wharf in question has been extinguished under the provisions of Part II. (relating to Limitation of Actions and Suits) of the Real Property Act of 1915.

The material facts may be shortly stated:—

In the year 1850 certain Crown lands, described as allotment No. 4 of s. 8, in the parish of Cut Paw Paw on the west bank of the Yarra River (then called Hobson's River), and

(1) (1871) L. R. 7 Q. B. 166. (2) (1874) L. R. 9 Ch. 423.
(3) (1876) 1 App. Cas. 662.

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as bounded on the east by the river, were granted by the Crown to a predecessor in title of the appellants.

In the year 1873 the wharf was, with the consent of the representatives of the Crown, constructed by the then owners of allotment No. 4 partly on the bed and partly on the foreshore of the river. It was completed towards the end of that year or early in 1874.

Shortly after the completion of the wharf the space on the landward side thereof was filled in with rubble or other material so as to bring it to the level of the wharf and was decked over. The space thus filled in is the northern strip.

Meanwhile, on July 7, 1875, the said allotment was acquired by the Victoria Sugar Co., who proceeded to erect thereon a sugar-refining factory. Portions of the factory buildings, known as old No. 6 and old No. 8, were erected on the northern strip, and the whole of the strip and the wharf were used and occupied by this company for the purposes of their business, and, after the acquisition by the appellants in the year 1888 of the property of the Victoria Sugar Co., have been so used and occupied by them.

The wharf is a solid timber construction, supported by piles driven into the bed or foreshore of the river and enclosed by horizontal baulks of timber fastened to the piles and decked over. On the northern strip and on the wharf there have for many years been lines of railway constructed by the appellants, or the Victoria Sugar Co., for the purposes of their business.

On January 1, 1877, the Melbourne Harbour Trust Act, 1876, hereinafter called the Act of 1876, came into operation. By this Act the Melbourne Harbour Trust Commissioners were created, and the port, as described in the Act, previously Crown land, was vested in them.

On July 4, 1890, on the application of the appellants, an amended certificate of title to allotment No. 4 was issued, in which the land is described as delineated and coloured red on the map in the margin containing 13 acres 3 roods $7\frac{7}{10}$ poles or thereabouts. The western boundary on the plan is Whitehall Street, and the western, northern and

southern boundaries are marked with measurements in feet and inches. The eastern boundary is represented by an irregular line marked "River Yarra." Their Lordships agree with the findings in the Courts below that the description in the certificate does not include either of the strips in question in this action, and a fortiori does not include the wharf or any part of the site thereof.

In the year 1890, as part of a general consolidation of the Statutes of Victoria, the Melbourne Harbour Trust Act, 1890, herein referred to as the Act of 1890, was passed, repealing the Act of 1876 and vesting the port of Melbourne in the Harbour Commissioners under the new Act.

On March 20, 1890, the appellants wrote to the Commissioners a letter stating that it was their intention to erect a store No. 6, which would require to be built on a concrete foundation, enclosing a plan of what was proposed, and asking whether there was any objection on the part of the Commissioners. On receiving a reply to this letter to the effect that the Commissioners had no objection to the proposed work, the appellants proceeded to pull down the old store No. 6 and to erect their new store No. 6. The site of the new No. 6 is slightly farther back from the river than that of the old No. 6, but still includes a considerable part of the northern strip. It has for foundation a concrete wall on the northern and eastern sides. The floor of the old No. 6, so far as it is outside the limits of the new store, was left in situ, and constitutes a continuation of the decking of the wharf and the rest of the northern strip up to the new No. 6.

The northern strip and the wharf have remained unaltered since the year 1890, and have been continuously occupied and used by the appellants for the purposes of their business.

In the year 1895 an agreement was made between the Commissioners and the appellants whereby the Commissioners agreed to construct a wharf to the south of the old wharf and to lease it to the appellants for the term of twenty-one years, and it was a term of the agreement that the appellants should at their own expense fill in and reclaim the land behind the piling of the new wharf.

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This was duly effected, and the land so reclaimed is the southern strip.

Various buildings and other works have been erected by the appellants on portions of the southern strip, and the whole of such strip has since 1895 been in the exclusive possession of the appellants, who have used it continuously for the purposes of their business.

Their Lordships, for the purposes of this judgment, assume that, as against the Commissioners, the possession and use by the appellants of the wharf and of the two strips of land was without legal title, and that their title, if any, depends upon the statute of limitations.

The wharf and the two strips of land appear to have been used and occupied by the appellants in every respect and in the same way for the purposes of their business as the rest of their factory. The whole was enclosed on the landward side and was entered by gates shut and locked on Sundays, and there has been a gate-keeper there night and day, the public being thus excluded, except, of course, on the river side, where the wharf was open and unguarded, but it does not appear that there was any substantial use made of this mode of access by persons other than those who had business there in connection with the factory.

There is no evidence of any act of ownership on the part of the Commissioners or their representatives during the material periods. There is some evidence that as to the wharf it was regarded by officers of the Commissioners as private property: see the letter of the Harbour Master to the Commissioners dated September 17, 1897, Record, p. 218.

On the facts above stated, their Lordships are of opinion that the continuous use and occupation by the appellants, and as to the wharf and the northern strip by their predecessors, and the absence of any acts of ownership by the respondents or their predecessors, ought to be held to amount to a discontinuance of possession on the part of the respondents and their predecessors. It is not easy to fix with precision the time when such discontinuance began, but in the case of the wharf and the northern strip the expiration of a year

from the coming into operation of the Act of 1876 may fairly be taken as at all events approximately correct, in which case the period of limitation (fifteen years) expired in 1893. In the case of the southern strip the period commenced with the completion of the work in the latter part of 1895, and expired in the latter part of 1910.

The respondents, in opposition to this view, laid some stress on the user at times of the wharf for the landing of goods other than those of the appellants and on the maintenance of an office for a customs house officer, but even if these events took place by direction of the respondents and their predecessors, which is not asserted by the respondents, this may well have been given under their powers of control and management vested in them and their predecessors by the several Acts of 1876, 1890 and 1915, powers which were not confined to land vested in them as owners but extended to all wharves, docks, piers, jetties and so forth : see as to this matter Record, pp. 49 and 101.

As to the wharf, the construction of it was of such a nature as of itself to exclude the respondents from actual possession of every part of the site, although the water circulated through the interstices of the piles.

At the time, therefore, of the passing of the Act of 1890, the period of limitation, so far as concerns the wharf and the northern strip, had begun, but was not complete. As to the southern strip, the period began after the passing of the last-mentioned Act. As to all the lands in question, the period of limitation was complete before the passing of the Act next to be referred to, and assuming the limitation section of the Real Property Act for the time being in force to apply to the circumstances of the present case, the title of the respondents had then been extinguished.

Under these circumstances the Melbourne Harbour Trust Act, 1912 (hereinafter referred to as the Act of 1912), was passed amending the Act of 1890 and reconstituting the Commissioners by the formation of a new corporation.

Finally, in the year 1915, as part of a further general consolidation of the statutes of Victoria, the Melbourne

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Harbour Trust Act, 1915 (hereinafter referred to as the Act of 1915), was passed by which the respondents were constituted as successors of the previous Commission. The material provisions of this Act will be considered later.

As part of a scheme for the construction of a road on the western bank of the River Yarra, the respondents required possession of the two strips of land and of the wharf, and on August 19, 1919, purporting to act under s. 54 of the Act of 1915, they gave to the appellants a notice that the licence or right (if any) held by or granted to the appellants or their predecessors in title to occupy, hold or use the wharf and the two strips of land was thereby cancelled and determined and that possession of the wharf and lands was required to be given to the respondents at or before the expiration of three calendar months from the date of the service of the notice.

The appellants thereupon commenced the present action, claiming, amongst other things, a declaration that they were entitled to the two strips of land and the wharf by virtue of the statute of limitations.

The action was tried before Mann J., who, by his judgment delivered on September 12, 1924, decided on the point now in question that ss. 18 and 43 of the Real Property Act, 1915, had operated to extinguish the title of the respondents to the two strips of land. As to the wharf, he held that while the respondents had not been dispossessed of the water under the wharf, the appellants had, by virtue of the Real Property Act, 1915, acquired an easement of the right of retaining the wharf on piles by reason of their possession of the wharf.

By the formal judgment it was declared: (1.) that the appellants were entitled in fee simple to the two strips of land; (2.) that the appellants were entitled to the perpetual use and occupation of the wharf, subject to the powers of management and control conferred upon the respondents by the Act of 1915, and subject to all public rights in or relating to the river; and (3.) that the appellants were entitled as owners of the adjoining land to a right of easement over

that portion of the river bed lying under the said wharf to have and keep the said wharf erected upon piles in the said portion of the bed in such manner as to offer no further obstruction than there existed to the flow of water beneath the wharf. A consequential injunction was granted in effect, restraining the respondents from acting under the above mentioned notice, or interfering with the possession or enjoyment by the appellants of any part of the land, and a counterclaim of the respondents asserting their title thereto was dismissed.

The respondents appealed from this judgment to the High Court of Australia.

On June 9, 1925, the High Court made an order allowing the appeal and discharging the judgment of the Supreme Court of Victoria, and in lieu thereof declared and adjudged: (1.) that the present appellants as registered proprietors of their allotment were entitled, subject to whatever powers, duties and authorities were vested in the respondents by the Act of 1915, to exercise the rights of a riparian owner over the two strips of land and the wharf; and (2.) that otherwise the appellants' action be dismissed. On the counterclaim, a declaration of their title, as asked by the respondents, was made, and an order that they recover possession accordingly.

By an Order in Council dated February 1, 1926, special leave to appeal to His Majesty in Council was granted to the appellants.

The question then is, Have the appellants, by virtue of the provisions hereinbefore referred to, of the Real Property Act, 1915, acquired a title to the two strips of land and to the wharf, or any of them? As to the wharf, there is a further question. What is the nature of the title so acquired? Is it an estate in fee simple in the site of the wharf, or is it merely a right of user and possession and an easement of support, as held by Mann J.?

As to the main question, the principal argument addressed to this Board by the respondents, and the only one with which it is really necessary to deal, was that the Act of 1915

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conferred upon the respondents a new title to the strips of land and the site of the wharf discharged from any adverse title previously acquired under the statute of limitation or otherwise, and that in reference to the last mentioned statute in particular the right to bring an action to recover the lands in question accrued to them for the first time upon the coming into operation of the Act of 1915, from which date the period of limitation ought to be calculated, and had, of course, not expired when they issued their notice above mentioned.

This argument raises a very important question as to the construction and effect of the Act of 1915.

An important factor in arriving at a solution of the question thus raised is that by the Acts Interpretation Act, 1915, passed on the same day as the Act of 1915, this Act is for the purposes of the Interpretation Act declared to be an Act consolidating Public Acts in force in Victoria on September 30, 1915.

The consolidating Acts came into operation on October 1, 1915.

The Acts Interpretation Act, 1915, contains the following material provisions: s. 6, sub-s. 2: "Where any Act passed on or after August 1, 1890" (the day on which the last preceding consolidation came into operation), "whether before or after the commencement of this Act repeals any other enactment, then unless the contrary intention appears the repeal shall not (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed"; and s. 33: "Subject to the said consolidating Acts" (of which, as already stated, the Act of 1915 was one): "All persons, things and circumstances appointed or created by and existing or continuing under the said public Acts at the said date" (namely, September 30, 1915) "shall continue unless and until other provision is made by and in accordance with law to have under the said consolidating Acts the same status, operation and effect as they respectively would have had if the said public Acts had not been repealed by the said consolidating Acts."

The words "subject to the said consolidating Acts" must, in their Lordships' opinion, mean only that the operation of the section is capable of being excluded or modified by an intention to that effect expressed or necessarily implied in a consolidating Act. They cannot mean that the provisions of the consolidating Act, whatever they may be, override and exclude the operation of the section. To give them this construction would be to strike out the section altogether.

The result is that if prior to the repeal by the Act of 1915 of the Act of 1890 and the Act of 1912, the title of the Commissioners to the land in question had been extinguished, and the right of the appellants thereto had been acquired, such right would not be affected by the repeal unless a contrary intention appears in the repealing Act. So, also, if the circumstances of continuous possession by the appellants and discontinuance of possession by the respondents had had on the titles of the Commissioners and the appellants respectively the effect just mentioned, these circumstances would continue to have the same effect under the Act of 1915 unless the provisions of s. 33 were excluded or modified by the last mentioned Act by express words or by necessary implication.

Before passing to the consideration of the material provisions of the Act of 1915, it is necessary to refer as shortly as may be to the previous legislation on the same subject, for it throws considerable light on the construction of the last mentioned Act.

By the Act of 1876, the Melbourne Harbour Trust Commissioners were incorporated under that name, and (by s. 47) it was provided as follows: "There shall be vested in the Commissioners upon trust for the purposes of this Act the bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in the 1st schedule to this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of this Act," and to certain rights of Her Majesty which need not be further specified.

This was a vesting in the true sense—namely, that it

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transferred the lands, the subject of its text, from the Crown to the Commissioners. In the First Schedule the boundary of the lands so vested at the material point is described as running "southerly by allotments 1 to 7."

As already stated, their Lordships are dealing with the matter on the footing that none of the premises in question were included in allotment 4, the property of the appellants, and these premises were, therefore, by the Act of 1876 vested in the Commissioners.

The Act of 1876 was amended in 1883, but the amending Act contains nothing material to the present question.

The next material event is the general consolidation of 1890. Of the Acts then passed those to be considered are the Act of 1890 already mentioned, and an Acts Interpretation Act, 1890. This latter Act contained a provision identical in terms with s. 6, sub-s. 2, of the Acts Interpretation Act, 1915, and a provision (s. 32) to the same effect as s. 33 of that Act except that the words "subject to the said consolidating Acts" in that section do not appear in s. 32 of the earlier Act.

The Act of 1890 contains no general transfer of property from the Commissioners of 1876 to those of 1890, probably because the constitution of the Commissioners remained unaltered and the provisions of the Interpretation Act, 1890, were sufficient to affect such transfer. It contained two other material sections, 46 and 47.

Sect. 46 is in the following terms: "The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Part I. of the 3rd Schedule to this Act are hereby declared to have been vested in the Commissioners at the time of the passing of the 'Act of 1876' upon trust for the purposes of the said Act and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the date of the passing of the 'Act of 1876' and to the rights of Her Majesty mentioned in the last-mentioned Act."

Sect. 47 contains similar provisions with regard to certain lands added to the Port under the Amending Act of 1883.

The phrase "the Commissioners" is defined by the Act of 1890 to mean "the Melbourne Harbour Trust Commissioners," without reference to any particular statute appointing them.

In Part I. of the Third Schedule to the Act of 1890, the boundary of the Port at the point in question is described in the same terms as it is in the Schedule to the Act of 1876.

By the Act of 1912 the Melbourne Harbour Trust Commissioners were reconstituted and a new body of Commissioners was incorporated, and by s. 4, sub-s. 1, it was provided that all property, real or personal . . . . which immediately before the appointment of Commissioners pursuant to the Act of 1912 was vested in the Commissioners by the Act of 1890 or any other Acts or by any means whatever, should by virtue of this Act be and become transferred to and vested in . . . . the Commissioners appointed pursuant to the Act of 1912.

If it be correct to say, as has been said above, that by the time the Act of 1912 was passed the title of the Commissioners to the lands in question was extinguished, then such lands were not vested in the Commissioners immediately before the appointment of Commissioners pursuant to the Act of 1912, s. 4, sub-s. 1, of that Act had no operation upon them, and they did not under that section become vested in the last mentioned Commissioners.

By s. 2 of the Act of 1915 the whole of the Acts of 1890 and 1912 were repealed, and it was provided that such repeal should not affect a number of things therein enumerated, entered into, executed, or prepared under the said Acts or any of them before the commencement of the Act of 1915.

It was argued that the saving of the things enumerated was exhaustive. Their Lordships cannot accept this view. The operation of the Acts Interpretation Act, 1915, can only be excluded "if a contrary intention appears." The mere enumeration, as unaffected by the repeal, of things of a certain class cannot, in their opinion, be properly held

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to disclose a "contrary intention" within the meaning of the Act.

By s. 3 it was provided that in the construction of the Act, unless inconsistent with the context or subject-matter, "Commissioners" mean the Melbourne Harbour Trust Commissioners—namely, without distinguishing the various bodies of Commissioners from time to time constituted.

By s. 11 it was enacted that all property real or personal . . . . which immediately before the appointment of Commissioners under the Act of 1912 was vested in . . . . the Melbourne Harbour Trust Commissioners by the Act of 1890, or any other Acts, or by any means whatever, should by virtue of the Act of 1915, be and become transferred to and vested in . . . . the Commissioners appointed pursuant to that Act. This, of course, was a true vesting section, operating a transfer of the lands affected by it.

It has already been pointed out that the lands in question had by the operation of the statute of limitations ceased before the appointment of Commissioners under the Act of 1912 to be vested in the Commissioners, and they therefore were not by this section transferred to or vested in the present Commissioners.

Sect. 46 is as follows: "The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Parts I. and III. of the 2nd Schedule to this Act, excluding therefrom the pieces or parcels of land within the metes and bounds described in Part II. of the said Schedule, are hereby declared to have been vested in the Commissioners upon trust for the purposes of the said Act and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act but subject to the estate and interest of any persons in such pieces or parcels of land existing at the time of the passing of the 'Act of 1876'"; and to the rights of His Majesty specified in the last mentioned Act.

Sect. 48 was as follows: "Except as expressly provided in other sections of this Act, the exclusive management and control of the port, shipping, lightships, buoys, beacons,

moorings, wharfs, docks, piers, jetties, ferries, landing stages, slips or platforms, lighthouses and the preservation and improvement of the port generally are hereby declared to be vested in the Commissioners and shall not be interfered with by any person whatsoever save and except " as thereby specified.

In the Second Schedule the boundary of the port at the part in question is again described to be " by the eastern boundaries of allotments 1 to 7."

In considering the construction and effect of this Act, the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.

The contention on the part of the respondents is that inasmuch as the lands in question are within the description contained in Part I. of the Second Schedule, the effect of the words " shall continue to be vested in the Commissioners " is that, notwithstanding the extinguishment of the title of the Commissioners under the limitation sections of the Real Property Acts, the property shall remain for all time vested in the respondents : in other words, that the provisions of the Real Property Acts as to limitation are not to apply to the lands in question. The contention is put in another way—namely, that the effect of the section is that under it the lands become for the first time vested in the respondents and that there is no person through whom they claim discontinuance of whose possession would affect them. The result is the same in whichever way the argument is framed.

Their Lordships cannot accept the contention. It is, in their Lordships' opinion, possible to give to the section a more reasonable construction, and one which would not have the effect of destroying private rights already acquired. The section which conveys to the respondents the property possessed by the previous Commissioners is s. 11. Assuming, then, that the title of these Commissioners had already been extinguished by discontinuance of possession before the passing of the Act of 1915, s. 11 of that Act passed no property

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in the lands in question to the respondents, and it is unreasonable to suppose that it was intended by s. 46 to make a separate conveyance purporting to include those lands and in that way revive against the appellants a title already extinguished. It is unnecessary to give such a construction to the section. It is to be observed that it is obvious that some words have been omitted. The words "upon trust for the purposes of the 'said Act,'" are meaningless unless a previous Act is mentioned. A reference to the corresponding section of the Act of 1890 makes it reasonably clear how the omission should be supplied. In the last mentioned Act the words are "at the time of the passing of the Act of 1876," and it seems obvious that in the Act of 1915 a similar reference, either to the Act of 1876 or to the Act of 1890, has accidentally dropped out as the result of a copyist's error or in the printing, and that such a reference should be inserted between "Commissioners" and "upon trust." For the purposes of the present case, it is immaterial which of the two Acts is referred to, but it seems probable that the reference would have been to the last consolidation—namely, to the Act of 1890.

Even without the insertion of any words, the construction of the section is reasonably clear. It seems to their Lordships that it is not a vesting section in the sense that it operates to transfer to the respondents any land at all. It refers to the vesting as a state of things already accomplished—as it had, in fact, been by "the said Act" (whether that be the Act of 1876 or the Act of 1890) in reference to the previous Commissioners, and by s. 11 of the Act of 1915 in reference to the Commissioners under that Act, and declares the purposes for which that state of things had been so brought about.

The word "continue" merely expresses the fact that the state of things applies to the present Commissioners as well as to their predecessors and that the purposes for which it had been brought about in their case were the purposes of the new Act. It is true that on this construction the lands in question are referred to as vested in the present Commissioners,

but this is merely an erroneous statement of fact, and ought not to be held to affect the rights of either the appellants or the respondents. In this view there is nothing in the section indicating an intention to exclude or modify the provisions of s. 33 of the Interpretation Act. The circumstances existing under the Act of 1890 are to continue to have the same operation and effect as they would have had if the Act of 1890 had not been repealed. Among the circumstances existing under the Act of 1890 was the fact that as between the appellants and the respondents the title of the latter to the lands in question had been extinguished and that title is not revived by the Act of 1915.

Some stress was laid on the fact that the vesting is in s. 46 referred to as subject to the interests of any persons in the lands mentioned existing at the time of the passing of the Act of 1876, and to the right of His Majesty already referred to. But this provision is taken from the previous Acts; there may have been some special reason for its insertion, but, in any case, it is not necessarily exhaustive.

The argument that the respondents do not claim through previous Commissioners fails because, in their Lordships' view, they are by express statutory provision affected by the circumstances existing at the date of the transfer to them. At the same time their Lordships must not be taken to accept the contention that, merely because the conveyance is statutory, they do not claim through their predecessors, within the meaning of the limitation clauses of the Real Property Acts. This last point, however, does not call for decision.

On the whole, their Lordships are of opinion that under the limitation section of the Real Property Act, 1915, the appellants have acquired a good title to the lands in question and, accordingly, that the appeal ought to be allowed, the order of the High Court of Australia discharged, and that of the Supreme Court of Victoria in substance restored. They think, however, that the latter order should be varied by omitting the two declarations 2 and 3, and inserting instead a declaration that the appellants are entitled in fee

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simple to the land parcel of the bed and foreshore of the river, being the site of the wharf, the subject-matter of the action, and to the said wharf, but subject as in the present second declaration expressed, and so that they shall not be at liberty to increase the obstruction at present existing to the flow of the water beneath the wharf.

In making declarations Nos. 2 and 3, the learned trial judge appears to have thought that there could be an estate in the water as distinct from the land covered by it. This is a mistake. What the appellants have acquired is an estate in land covered with water, being the site of the wharf. Moreover it is difficult to see how such a right as is described in the second declaration could be acquired as an easement. It is really a right of ownership. It follows that the cross-appeal must be dismissed with costs.

Their Lordships will accordingly humbly advise His Majesty that the appeal ought to be allowed and the order of the High Court of Australia discharged, with costs here and below, and that the order of the Supreme Court of Victoria ought to be restored with the variation above expressed, and that the cross-appeal ought to be dismissed with costs.

Solicitors for appellants: *Bircham & Co.*

Solicitors for respondents: *Markby, Stewart & Wadesons.*

[PRIVY COUNCIL.]

PRICE BROTHERS AND COMPANY, LIMITED . . . . . } APPELLANTS;

AND

CORPORATION D'ENERGIE DE MONTMAGNY AND ANOTHER . . . } RESPONDENTS.

J. C.* 1927 Jan. 18.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC, APPEAL SIDE.

Canada (Quebec)—Vendor and Purchaser—Restrictive Covenant—Servitude or personal Stipulation—Assignment—Absence of Interest to support Action—Civil Code, arts. 499, 546, 1029—*Civil Procedure Code, art.* 77.

In 1918 land in Quebec was sold, the deed of sale containing an agreement by the purchasers, on behalf of themselves, their heirs, representatives, successors and assigns, never to sell or distribute electric power derived from the property for lighting in a certain district; it being stated that a passive servitude was thereby created. In 1919 the purchasers sold the land to the respondents subject to the obligations in the deed of sale of 1918, and to all servitudes created by them. In 1920 all the assets of the vendors of 1918 were sold and transferred to the appellants. They sued the respondents, alleging a breach of the stipulation in the deed of 1918, and claiming an injunction. By the Civil Procedure Code of Quebec, s. 77, "no person can bring an action at law unless he has an interest therein. . . . .":—

Held, that the action could not be maintained. No servitude was created under the Civil Code of Quebec, since no dominant tenement was defined; and, though under that Code the benefit of the obligation was assignable, and was capable of being made in a form which gave the benefit to a third person, the appellants could not sue on the personal covenant, because they had no interest to satisfy s. 77 of the Civil Procedure Code.

Judgment of the Appeal Side (Q. R. 40 K. B. 272) affirmed on different grounds.

APPEAL (No. 114 of 1925) by special leave from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (June 15, 1925), reversing a judgment of the Superior Court (January 12, 1925).

On October 10, 1918, Price Brothers & Co., Ld., sold to Rousseau and Hébert certain land on the banks of the

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT DUNEDIN, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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Rivière du Sud in the Province of Quebec. The deed of sale contained a clause, set out in the judgment of the Judicial Committee, whereby the purchasers bound themselves, their heirs, representatives, successors and assignees not to sell or distribute electric power derived from the property for the purpose of lighting in a specified district, and it was agreed that a passive servitude on the property should thereby be created.

On March 5, 1919, Rousseau and Hébert sold the land to the first respondents, the Corporation d'Energie de Montmagny, subject to the obligation of the deed of 1918 and to all servitudes created by them.

On October 7, 1920, Price Brothers & Co., Ld., were reincorporated under the same name, and by a deed of October 30, 1920, all the assets of the old company were conveyed to the new company, the present appellants.

On October 3, 1922, the appellants brought the present action in the Superior Court, alleging a breach of the above stipulation and claiming an injunction. The second respondents, an electricity distributing company, were added as defendants.

The trial judge (Letellier J.) granted the injunction as prayed.

An appeal to the Court of King's Bench was allowed by a majority. Allard, Bernier and Rivaud JJ. held that the action failed, as only 16 per cent. of the electric power used by the defendants for lighting in the district in question was derived from the property sold in 1918. Flynn J. was of opinion that an action claiming only an injunction was not maintainable under the law of Quebec. Guerin J. dissented, being of opinion that the appeal should be dismissed. The appeal is reported at Q. R. 40 K. B. 272.

1926. Dec. 2, 3, 6. *Lafleur K.C.* and *Pritt* for the appellants. The appellants are entitled to an injunction. Power derived from the lots sold in 1918 was used for purposes which the deed prohibited ; it is not material that that power was used in conjunction with power derived from another

source. Even if the clause did not create a servitude under the Civil Code, the appellants, as assignees of all the assets of the vendors of 1918, are entitled to enforce the contractual obligation: Civil Code, arts. 1029, 1030, 1486, 1570. Under the Civil Code the only contracts which are not assignable are those which relate to personal services. *Formby* v. *Barker* (1) is distinguishable, since the Civil Code permits a third party to have or to acquire rights and obligations under a contract to a greater extent than English law. The view that under the law in Quebec an action will not lie for an injunction without a claim to other relief was erroneous: *Canada Paper Co.* v. *Brown* (2); Civil Code, arts. 1065, 1066; Civil Procedure Code, art. 971. The law in Quebec as to the duty of the Court to enforce covenants is the same as was laid down by Lord Cairns in *Doherty* v. *Allman.* (3)

Hon. Geoffrey Lawrence K.C. and *Rousseau K.C.* for the respondents. The appellants proved no such interest as is required by art. 77 of the Civil Procedure Code to enable them to sue. The article accords with the law in England and in Scotland: *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (4); *Hislop* v. *Leckie* (5); *Earl of Zetland* v. *Hislop.* (6) *Formby* v. *Barker* (7) shows, in any case, that the covenant was a purely personal one. Even if the original Price Brothers & Co., Ld., had an interest, they may have parted with it. The appellants acquired merely the business and its assets as existing at the date of the transfer. The facts in the present case nearly resemble those in *Houille* v. *Noue* (8), the decision supporting the respondents. Further, the covenant relied on was in restraint of trade, and illegal, since it was wider than was necessary for the protection of the obligee: *Nordenfelt* v. *Maxim-Nordenfelt Co.* (9)

Lafleur K.C. in reply. The appellants acquired by transfer the whole assets and rights of the earlier company, including

(1) [1903] 2 Ch. 539.
(2) (1922) 63 Can. S. C. R. 243.
(3) (1878) 3 App. Cas. 709, 719.
(4) [1926] A. C. 108, 121, 122.
(5) (1881) 6 App. Cas. 560.
(6) (1882) 7 App. Cas. 427.
(7) [1903] 2 Ch. 539, 554.
(8) 1857, Dalloz, Recueil Périodique, vol. ii., p. 109.
(9) [1894] A. C. 535, 549.

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that company's interest in the observance of the covenant: Civil Code, art. 1486.

1927. The judgment of their Lordships was delivered by VISCOUNT HALDANE. The only question which it is necessary for their Lordships to answer in order to dispose of this appeal arises out of facts which may be stated very briefly.

On October 10, 1918, certain lots of land on the banks of the Rivière du Sud in Quebec were sold by the predecessors in title of the appellants to Messrs. Rousseau and Hébert for $5000. The deed of sale contained the following stipulation: "The purchasers hereby bind and oblige themselves, their heirs, representatives, successors and assigns as proprietors of the lots of land hereby sold never to sell or to distribute electric power derived from the property hereby sold for lighting purposes in the town of Montmagny and in the parish of St. Thomas, and in order to guarantee the fulfilment of this condition a passive servitude is hereby created on the property hereby sold."

The appellants are incorporated by provincial charter of October 7, 1920. They had succeeded to all the assets of another corporation created by charter of 1904 and by supplementary charter of 1910. These assets were conveyed to them by deed of sale of October 30, 1920.

On October 10, 1918, the older corporation had sold to Rousseau and Hébert, as already stated, all the rights which the vendors might possess in the lots specified with the burden of the obligations just set out. On March 8, 1919, Rousseau and Hébert had divested themselves of these lots in favour of the first respondent corporation, the Corporation d'Energie de Montmagny. They sold the lots subject to all the obligations contained in their own title deed and to all the servitudes, active and passive, created by the sellers or their predecessors in title, or stipulated in their favour and mentioned in the title deeds.

The second respondent, the Compagnie Electrique de Montmagny, is a distributing company which sells electric

light in the town of Montmagny, and which has been impleaded in the present suit, because a violation is alleged of the restriction already set out as contained in the deed of sale of October 10, 1918.

The first respondent was alleged, operating with the aid of the second respondent, to have distributed in Montmagny not merely electric energy for power purposes, as it was entitled to do, but also such energy for lighting. In October, 1922, the appellants commenced an action against the two respondent companies, claiming an injunction to restrain the sale of electrical power for lighting purposes in the town of Montmagny and the parish of St. Thomas, and for consequential relief. At the trial of the action various points were raised. Letellier J., who tried the case, decided these points in favour of the appellant company and gave judgment for it with costs. On appeal to the Court of King's Bench of Quebec that Court, by a majority of four to one, allowed the appeal and dismissed the action with costs. One of the main reasons was that the bulk of the power generated by the first respondent, so far as used for purposes contrary to the obligation, was generated from properties to which the obligation did not relate, and that it had, therefore, not been proved that there was any violation.

Their Lordships have, however, come to the conclusion that there is an antecedent question which supersedes those raised in the Court of King's Bench. That question was raised and pressed by Mr. Lawrence in the able argument which he put forward at the Bar. It is whether the right conferred by the terms in which the obligation is expressed in the sale deed of 1918 amounted to a servitude, the benefit of which remained after the then Corporation had disposed of it to the present Corporation in 1920, or whether it was a mere personal right which could not be transmitted on the footing of being attached to a dominant tenement. For it is clear that no such dominant tenement is defined by the terms of the obligation, and the mere declaration that a passive servitude was constituted could not, in itself, carry the matter further. Their Lordships are of opinion that

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when the purchasers in 1918 bound and obliged themselves, their heirs, representatives, successors and assigns, as proprietors of the lots of land hereby sold, all they did was to enter into an obligation to the vendors personally. No doubt the benefit of this obligation was assignable, and it was capable of being made in a form which gave the benefit to a third person. The law of Quebec, as expressed in art. 1029 of the Civil Code, differs in this respect from the common law of England. But unless the third person possessed an interest within the meaning of art. 77 of the Code of Civil Procedure of the Province he could not sue. The old corporation had parted by the sale of 1918 with the whole of its interest in the lots it sold, and there remained nothing which could serve as a dominant tenement to which a real servitude was attached for its benefit: Civil Code, arts. 499 and 546. Even, therefore, if the appellant corporation had acquired the benefit of a personal stipulation from the earlier corporation, it would not thereby be invested with the interest in the subject-matter required by art. 77 of the Code of Civil Procedure in order to enable an action to be brought. And this difficulty is also fatal, in their Lordships' view, to the application of the principle stated by Lord Cairns in his judgment in *Doherty* v. *Allman* (1), that when there is a negative covenant the duty of a Court of equity is simply to enforce it. The decision in *Formby* v. *Barker* (2) is one which turns in part on principles which are peculiar to English law, but it is relevant as authority for the interpretation of the words of the stipulation in question as conferring a right of a merely personal character as distinguished from one of servitude. It is true that the law of Quebec, unlike the common law of England, permits a person who is not a party to a contract to acquire a right which is quaesitum tertio in his favour, but that difference does not in the present case assist the appellants, who lack the interest required by art. 77 of the Code of Civil Procedure.

The objection thus stated is one which goes to the root of the appellants' title to maintain this action. If it is well

(1) 3 App. Cas. 709, 719. (2) [1903] 2 Ch. 539.

founded, as their Lordships consider that it is, it renders it unnecessary to decide any other point raised.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

BRITISH AMERICA NICKEL CORPORATION, LIMITED, AND OTHERS . . . } APPELLANTS;

AND

M. J. O'BRIEN, LIMITED . . . . . RESPONDENTS.

J. C.*
1927
Jan. 18.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Company—Debenture Holders—Trust Deed—Modification of Security—Resolution of Majority—Resolution carried by Vote of Holder having special Interest—Secret Bargain—Scheme providing for Committee with Power to modify Terms—Ultra vires.

A company, incorporated in Canada, issued mortgage bonds secured by a trust deed, which gave power to a majority of the bondholders, consisting of not less than three-fourths in value, to sanction any modification of the rights of the bondholders. A scheme for the reconstruction of the company provided for the mortgage bonds being exchanged for income bonds subject to an issue of first income bonds; also that a committee, one only of whom was to be appointed by the mortgage bondholders, should have power to modify the scheme without confirmation by the bondholders. The scheme was sanctioned by the majority of the bondholders requisite under the trust deed. The required majority would not have been obtained but for the vote of the holder of a large number of bonds, whose support of the scheme was obtained by the promise of a large block of ordinary stock, an arrangement which was not mentioned in the scheme:—

Held, that the resolution was invalid, both because the bondholder in voting had not treated the interest of the whole class of bondholders

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as the dominant consideration, and because the scheme, so far as it provided for a committee, was ultra vires.

Goodfellow v. *Nelson Line* [1912] 2 Ch. 324 approved and distinguished. Judgment of the Appellate Division 57 Ont. L. R. 536 affirmed.

APPEAL (No. 52 of 1926) from a judgment of the Supreme Court of Ontario, Appellate Division (September 25, 1925), affirming a judgment of Kelly J.

The respondent company, holders of mortgage bonds in the British America Nickel Corporation, Ld., the first appellants upon the present appeal, brought an action in the Supreme Court of Ontario against that company and the trustees for the bondholders, claiming an injunction to restrain the defendants from giving effect to a scheme for the reconstruction of the defendant company, and from acting upon resolutions sanctioning the scheme passed by the bondholders. An interim injunction was applied for, but the Court allowed the scheme to be carried into effect subject to the payment of damages.

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge (Kelly J.) held that the resolutions sanctioning the scheme were invalid, and granted the plaintiffs the appropriate relief in damages. The judgment was unanimously affirmed by the Appellate Division (Mulock C.J.O., Magee, Hodgins, Ferguson and Smith JJ.A.) in a judgment delivered by Ferguson J.A. reported at 57 Ont. L. R. 536.

1926. Dec. 14, 16. *Maugham K.C.* and *Osler K.C.* for the appellant referred to decisions mentioned in the judgment of the Board, relying particularly upon *Goodfellow* v. *Nelson Line*. (1)

Tilley K.C. and *W. G. Hewitt* for the respondents were not called upon.

1927. Jan. 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal against a judgment of the Court of Appeal of Ontario, affirming the judgment

(1) [1912] 2 Ch. 324.

of Kelly J., by which it was found in favour of the minority of a class of secured debenture holders of the appellant corporation that the minority were not bound by resolutions passed by the majority of the class of such debenture holders. The latter had purported to exercise a power conferred on such a majority by the terms of a trust deed. The resolutions in question sought to modify the rights of the debenture holders as an entire class.

Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not

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arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

It was decided by the Judicial Committee in 1887, in *North-West Transportation Co.* v. *Beatty* (1), that where a contract, fair in its terms and within the powers of a company, had been entered into by the directors with one of their own number, as a vendor to them, and was therefore voidable, it could not be assailed. The reason was that it had been ratified by the shareholders at a general meeting. At this meeting the ratification was actually obtained by the aid of the votes of the vendor director himself and his nominees, which produced a majority of shareholders' votes at that general meeting. The vendor in exercising his votes had thus a direct personal interest. It was held that the affirmance of the voidable contract, being matter only of internal policy, was binding on the company, and further that every shareholder, including the vendor, had a right to vote on such a question, notwithstanding that he might have a personal interest in the subject-matter in conflict with the interest of the company itself. As its constitution enabled the vendor individually to acquire shares freely, he was entitled to the votes these carried and to qualify a majority at the meeting. Having regard to the constitution of the company this could not be said to be oppressive so as to invalidate the voting. There the question arose, not as regarded a class of creditors, but of shareholders.

In *Burland* v. *Earle* (2) the question before the Judicial Committee was whether it was ultra vires for a company to carry its profits to reserve instead of dividing them, and to invest them in a manner which, although not ultra vires, was objectionable. It was also a question with shareholders only. A minority of shareholders sued the others, the

(1) (1887) 12 App. Cas. 589. (2) [1902] A. C. 83.

company itself not being a plaintiff, to compel the company and its directors to distribute accumulated profits, and also to compel the appellant Burland to hand over certain funds invested in his sole name. It was held that the question, being in no way one of ultra vires action, was one of internal management only, and that any action that could be taken required that the company itself should be plaintiff. It would have been otherwise had the acts complained of been of an ultra vires or actually fraudulent character, as had been explained by James and Mellish L.JJ. in *Menier* v. *Hooper's Telegraph Works* (1), where the majority of the shareholders had improperly appropriated to themselves property which belonged to all the shareholders equally. It was laid down in *Burland* v. *Earle* (2) that a shareholder is not debarred from using his voting power as a shareholder to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote, following in this the decision in *North-West Transportation Co.* v. *Beatty*. (3)

It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally, but on a special class, say, of debenture holders, where a majority, in exercising a power to modify the rights of a minority, must exercise that power in the interests of the class as a whole. This is a principle which goes beyond that applied in *Menier* v. *Hooper's Telegraph Works* (1), inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a

(1) (1874) L. R. 9 Ch. 350. (2) [1902] A. C. 83.
(3) 12 App. Cas. 589.

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negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

The distinction, which may prove a fine one, is well illustrated in the carefully worded judgment of Parker J. in *Goodfellow* v. *Nelson Line*. (1) It was there held that while the power conferred by a trust deed on a majority of debenture holders to bind a minority must be exercised bona fide, and while the Court has power to prevent some sorts at least of unfairness or oppression, a debenture holder may, subject to this vote in accordance with his individual interests, though these may be peculiar to himself and not shared by the other members of the class. It was true that a secret bargain to secure his vote by special treatment might be treated as bribery, but where the scheme to be voted upon itself provides, as it did in that case, openly for special treatment of a debenture holder with a special interest, he may vote, inasmuch as the other members of the class had themselves known from the first of the scheme. Their Lordships think that Parker J. accurately applied in his judgment the law on this point.

Their Lordships now turn to the facts in the appeal before them. The appellant Nickel Corporation was constituted under the law of the Dominion of Canada. The corporation was the owner of valuable mining properties in the Province of Ontario and of plant there and elsewhere. In 1913 the appellant corporation had bought from M. J. O'Brien, now represented by the respondent company, and from one John R. Booth, mining properties, and had given them as part of the purchase price, bonds secured on these properties amounting to approximately $3,000,000. On a reorganization, to be presently referred to, these bonds were exchanged for bonds secured under a trust deed. The Nickel Corporation had an authorized capital of $20,000,000, divided into 200,000 ordinary shares of $100 each. Before the reorganization the corporation had issued debenture stock to the amount of $10,000,000, secured by floating charges.

(1) [1912] 2 Ch. 324.

The appellant trust company was the trustee of a deed which constituted the floating security, and is also trustee of the securities in question in this appeal.

By contract of March 10, 1916, the British Government had agreed to purchase the Nickel Corporation's output of nickel up to a large amount for a period of ten years. On March 15, 1916, the Nickel Corporation, being desirous of reorganizing its finances and of putting them on a more satisfactory footing, executed a mortgage deed of trust in favour of the second appellant as trustee, to enable them to issue bonds. These bonds were issued at 6 per cent. interest, in two series, A and B, of $3,000,000 each, specially secured on assets of the Nickel Corporation, and ranking pari passu, with a difference only in the period for redemption. The bonds were held substantially as follows :—

	$
J. R. Booth, A bonds	2,184,000
(Mr. Booth had held bonds in the older form, which were now paid off.)	
J. F. Booth, A bonds	147,000
Frances D. Anderson, A bonds . .	38,000
C. A. Masten, A bonds . . .	6,000
M. J. O'Brien, Ld., A bonds . .	625,000
	$3,000,000
The British Government B bonds .	3,000,000
	$6,000,000

The British Government had, as already stated, bought the output of nickel by the appellant corporation, and it appears to have been desirous to strengthen the position of the corporation by aiding it to raise a loan.

The trust deed of March 15, 1916, provided power to a majority of the bondholders, consisting of not less than three-fourths in value, to sanction a reconstruction of the corporation, to enter into a scheme for selling its assets, to sanction any modification of the rights of the bondholders

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against the corporation or its property, either under the trust deed or otherwise, to accept other securities of the corporation in lieu of the bonds, or to consent to an issue of securities constituting a prior charge, together with other powers.

The effect of the war was to disorganize the markets of the appellant corporation, so that it was mainly by the aid of purchases of its stock by a Norwegian nickel group, and by the co-operation of the British Government, that the appellant corporation carried on its business between 1916 to 1919. The Norwegian group purchased both debenture stock and ordinary stock in large amounts. As the corporation was indebted to its bankers in the end of 1920, at a meeting of the first mortgage bondholders authority was given for the creation of a prior lien bond for $500,000, having priority over the first mortgage bonds, and this was issued to the bank.

In February, 1921, the Nickel Corporation made default in payment of the half year's interest due to the respondent on the first mortgage bonds. A scheme for reconstruction was prepared on behalf of the corporation and was laid before a meeting of the first mortgage bondholders on March 31, 1921. The object of this scheme was to compel the holders of the first mortgage bonds to exchange them for an amount of new "A" income bonds equal to the principal of the former bonds. The corporation was also to be at liberty to issue $6,000,000 of first income bonds at 10 per cent. interest and at 20 per cent. premium, to be a first charge on the property of the corporation. Provision was made for the issue of the "A" income bonds already referred to to rank subsequently to the first income bonds. The bank and the Norwegian creditors were, by means of these issues, to have their claims reduced. The corporation was also to be enabled to issue "B" income bonds to the amount of $12,500,000, ranking pari passu as to principal with the "A" income bonds. There was also given power by extraordinary resolution to sanction the exchange of the "A" income bonds into other securities, and the British

Government was to be relieved of its obligation to purchase nickel.

It was further provided by the scheme that a committee of four persons (one appointed by the first mortgage bondholders other than the British Government; one by the debenture stockholders; one by the bank, the Canadian Bank of Commerce, and a certain Dr. Eyde, representing the Norwegian interests; and one by the British Government) should have power to modify the scheme without confirmation by extraordinary resolution of the bondholders.

Mr. John R. Booth's vote was necessary in order to gain the required majority of bondholders, and it was secured by a promise to give him $2,000,000 of the ordinary stock of the Nickel Corporation. This stock was at the time of little value, but it was evident that if the price of nickel rose it might become of value. The promise to Mr. Booth was made some months before the new scheme was submitted to the bondholders.

The respondents protested against the adoption of the scheme, but it was carried by the prescribed majority at the meeting of March 31, 1921. The respondents then applied for an interim injunction, but the Court allowed the resolutions to be carried into effect, on the terms that if at the trial of the action it should be found that they ought not to have been carried into effect, the appellant trust company should pay to the respondents the amount of these bonds with interest.

At the trial in the Supreme Court of Ontario Kelly J. held that what was really done was that the majority at the meeting did not act in the bona fide exercise of the rights which the majority might exercise, but in consideration of what would benefit the Nickel Corporation and the personal interests of those whose votes were to be secured. The vote had been influenced by special negotiations in advance of the meeting. He also thought that it was outside the powers of the majority to confer on a committee, not necessarily representing the interests of the first mortgage bondholders, powers which belonged to these bondholders

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alone, and to authorize the substitution for their security of something which was not a satisfactory security. He therefore gave judgment for the respondents, the plaintiffs.

There was an appeal to the Appellate Division, where Ferguson J.A. delivered the judgment. He agreed with Kelly J. in holding that the votes neither of Mr. Booth nor of the British Government would have been given for the scheme had they been influenced only by what was most in the interest of the bondholders. Both of these may, he thought, have acted honestly if mistakenly. But what really moved them was not a legitimate consideration of the improvement of their security, but that they felt that a refusal to approve the scheme would result in serious loss to other persons who had lent to or invested in the corporation. They wished to give these persons a chance, even if a risk to the bondholders had to be taken in doing it. This the Appellate Division held to have been improper. On that ground they affirmed the judgment of Kelly J., and they affirmed it also on the ground that there was no power in the majority of the bondholders to delegate their power of binding the minority.

Their Lordships are of opinion that judgment was rightly given for the respondents in this appeal. In the first place, it is plain, even from his own letters, that before Mr. J. R. Booth would agree to the scheme of 1921 his vote had to be secured by the promise of $2,000,000 ordinary stock of the Nickel Corporation. No doubt he was entitled in giving his vote to consider his own interests. But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant. It may be that, as Ferguson J.A. thought, he and those with whom he was negotiating considered the scheme the best way out of the difficulties with which the corporation was beset. But they had something else to consider in the first place. Their duty was to look to the difficulties of the bondholders as a class, and not to give any one of these bondholders a special personal advantage, not forming part of the scheme to be voted for, in order to induce him to

assent. On this ground by itself their Lordships are of opinion that the resolutions cannot stand. They think, in the second place, that the appointment of a committee of four persons, with power to modify in a very extensive fashion the security of the mortgage bondholders, was ultra vires. As has been pointed out the appointment of the majority of this committee was not entrusted to the mortgage bondholders themselves. They might have acted together by a proper majority, but, neither in form nor in substance, was any power given to that majority to delegate. It was only under the provisions of the deed of mortgage and trust of March 15, 1916, that the scheme of May 31, 1921, could be made, and the former contained no provision authorizing it. Other points referred to in the judgments were raised in criticism of the scheme, but it is not necessary for their Lordships to enter on them.

For the reasons given they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1927 Jan. 18.

THE CROWN . . . . . APPELLANT;

AND

McNEIL AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia—Petition of Right—Money due under Contract—Delay in Payment—Recovery of Interest—Fiduciary Relation—"Claim founded on and arising out of breach of contract"—Crown Suits Act, 1898 (62 *Vict. No.* 9, *W. A.*), *s.* 33.

The Government of Western Australia purchased ore from the respondents under a contract whereby the Government was to smelt the ore, and, having realized its value, was to pay to the respondents the proceeds, less charges for smelting and realization. By proceedings under the Crown Suits Act, 1898, of the above State, the respondents recovered, in addition to sums due under the contract, interest from the dates when the sums respectively ought to have been paid. It was contended for the Crown that interest was not recoverable:—

Held, that the relation between the Crown and the respondents with regard to the ore was not merely that of buyer and sellers, but was of a fiduciary nature, which between subjects would import a liability to pay interest for delay in payment; and that the interest was recoverable in the proceedings, as the claim to it was one founded on and arising out of breach of contract, within the meaning of the Crown Suits Act, 1898.

Judgment of the Supreme Court of Western Australia affirmed.

APPEAL (No. 48 of 1926) from a judgment of the Supreme Court of Western Australia, dated September 21, 1925.

The appeal arose out of proceedings in the nature of a petition of right brought by the respondents in the Supreme Court of Western Australia under the Crown Suits Act, 1898, of that State.

The respondents' claim arose out of a contract under which they had sold ore to the Government, who agreed to smelt it and to pay the proceeds, less charges, to the respondents. The sole question on the appeal was whether the trial judge (Northmore J.) had rightly allowed to the respondents interest upon the sums found to be due to them.

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

The facts and the material provisions of the Crown Suits Act, 1898, appear from the judgment of the Judicial Committee.

1926. Nov. 30; Dec. 2. *Keenan K.C.*, *Pritt* and *F. L. Moss* for the Crown.

Barrington-Ward K.C. and *Barton* for the respondents.

1927. Jan. 18. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This appeal is brought on a petition of right in the Supreme Court of Western Australia under the Crown Suits Act of Western Australia, to recover a balance alleged to be due from the Crown. The judgment appealed from was delivered by Northmore J. on September 21, 1925. He awarded to the respondents 6572*l.* 15*s.* 2*d.*, the amount certified by the Master as due on the balance of account, and further, interest at 6 per cent. from the dates on which the sums constituting the debt became payable respectively. There is no dispute as to the principal sum, the only question being as to the claim for interest; but in order to render the case intelligible it is necessary to state shortly what were the relations between the parties, and how the controversy arose.

The respondents were the owners of the Ravensthorpe smelting works in the Phillips River Gold Mining district of Western Australia, and they were also mining lease-holders carrying on business as the West Australian Gold and Copper Mines. In December, 1913, the West Australian Government took over the smelting works from the respondents on a lease for seven years, with a view to operating them in a manner which would be in the interests of producers of auriferous copper in the district. For this purpose the Government entered into arrangements with the mining owners by which the Government was to purchase, smelt and realize all ore sent to the works by ore producers, in the district. The price was to represent the assay value of the ore, less charges for assaying, smelting and realizing the products of smelting. The terms agreed were embodied in

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regulations made by the Governor in Council and published in the West Australian Gazette of February 27, 1914, and these regulations were from time to time altered and amended. The ore so purchased by the Government was delivered to them from time to time at the works, and as it accumulated in sufficient quantities was subjected to smelting. Each period of smelting was termed a "campaign." There were in all nine of these "campaigns" completed during the time with which this appeal is concerned, the first beginning in January, 1916, and the ninth ending in December, 1918. The ore was smelted in the course of these "campaigns," and the resulting metal, after being refined, was transmitted for sale in the market. Under the agreement between the parties embodied in the regulations as from time to time amended, all these operations, including the sale of the ultimate product, were carried out by the Government, who were to account to the owners for the price at which they had bought after all deductions had been made. Controversy arose between the mineowners and the Government as to the meaning and application of these regulations, but after a very great deal of dispute and prolonged litigation it was found that the Government were indebted to the owners in the principal sum of 6572*l.* 15*s.* 2*d.*

The only question that remained was the claim for interest. There is no contract for the payment of interest on any sums due to the mineowners, and there is no provision in the Crown Suits Act with regard to such interest. The question of liability for interest was argued at the end of the proceedings in the Court below, and the Supreme Court of Western Australia allowed the claim.

The following are the reasons which were given for the decision of the Court on this point, which was delivered by Northmore J. on September 21, 1925:—

"The original judgment in this case was given on August 12, 1921, and under that judgment, as subsequently varied by the judgment of the High Court, accounts have been taken between the parties, and the Master has certified the result

of the taking of such accounts to be that a sum of 6572*l.* 15*s.* 2*d.* is due by the Crown (1) to the petitioners.

"The petitioners now move for judgment for the amount of 6572*l.* 15*s.* 2*d.*, together with the costs of taking the accounts, and interest upon the sums certified by the Master to be due in respect of the several campaigns. The only contest before me was in respect of the claim for interest.

"As the result of the inquiries before the Master, it now appears that the petitioners have been deprived of the use of several sums of money which should have reached their hands on various dates between April 18, 1918, and October 16, 1921, as the result of the 6th, 7th, 8th, 9th and 10th campaigns, and, apart from authority, it would seem right that they should be entitled to interest on those moneys from such several dates. On behalf of the Crown, however, it was contended that interest could not be allowed prior to the date of the certificate, because, it was said, the claim was simply one for accounts, and that there had been no fraud on the part of the officers of the Crown, who honestly believed that they were entitled to charge the actual total costs of the various campaigns, and in making out the accounts against the petitioners they had not made charges in excess of the actual total costs.

"If the matter rested there, if there were no other feature in the case, I should have felt bound to uphold the respondent's contention. But that argument does not fairly put the position. If the Crown's officers had made out the accounts in such a way as to show that they claimed to deduct the full smelting costs as against the charge of 30*s.* a ton fixed by the regulations, the petitioners would have been in a position to at once challenge the accounts. However, they did not take that course. On the contrary, they deliberately concealed that fact from the petitioners, because they showed the smelting charge at 30*s.* a ton and the realisation charges at a figure much in excess of the actual realisation costs, and in that way they misled the petitioners.

(1) ["Respondent" in the judgment as delivered; here we substitute "Crown" for clearness' sake.]

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In these circumstances, I think that this is a case where interest should be allowed. It was argued by counsel for the Crown that, whatever might be the case as between subject and subject, as against the Crown interest could not be allowed. I do not agree with that contention. This is an action brought under the Crown Suits Act, and s. 27 of that Act provides that in such actions the Court shall give and pronounce such and the like judgment, order, or decree on any such petition as such Court would give and pronounce in any action between subject and subject.

"Interest will therefore be allowed at the rate of 6*l.* per cent., and will run on the amount due in respect of each campaign from a period three months after the date upon which the accounts for such campaign were closed. I have fixed the starting point as being three months after the date of the accounts in accordance with the request of the petitioners' counsel, although in looking at the report of the case upon which he relied for making such request I notice that there was a reason for allowing a period of three months in that case which does not exist here."

In the opinion of their Lordships, interest was properly allowed in this case. The relation between the Crown and the owners with regard to these ores entrusted to the Crown for treatment and sale was not merely that of buyer and seller, but also fiduciary in its nature. The owners delivered their ores to the West Australian Government for treatment and sale, and on the terms that the balance of the sums realized by the sales of the products should be applied to discharge the sums due to the owners of the mines as sellers.

There was, in fact, great delay in making payment of these sums to the owners on the agreed terms, and it is in respect of such delay that the claim for interest arose.

The amended regulations issued on June 30, 1915, contained the following provisions, which are set out in the respondents' case, para. 9 :—

"9. In June, 1915, it became clear to the Government officials concerned that the charges authorized by the regulations were insufficient, and on June 30, 1915, amended

regulations were issued which, providing for increased charges for certain operations, also provided (inter alia) :—

"11. A charge will be made to cover the costs of receiving, sampling and smelting the ore to matte of 30*s.* per ton of ore (net weight) and for the further expenses of realizing the values therein there shall be an additional charge per ton of ore (net weight) of 3*s.* 6*d.* per unit of copper in the agreed assay value for copper, less the schedule deduction aforesaid, and 6 per cent. of the agreed assay value in gold and silver, less schedule deductions.

"15. Forthwith after agreement of assays advances in part payment towards purchase of the ores will be made if desired by the sellers after making the foregoing deductions and charges up to 90 per cent. of the net value of the ore calculated at such prices for the metals contained in it as may be fixed from time to time by the Minister by notice in the Government Gazette and which until further notice will be : Copper—56*l.* 10*s.* per ton of standard copper. Gold—80*s.* per ounce of fine gold. Silver—2*s.* per ounce of fine silver.

"16. The marketable products of smelting of any ore or metal-bearing material presented to the smelting works for purchase will be sold by the Minister at his discretion as opportunity offers, and any balances remaining from the sale of such products, after payment of all expenses incurred by the Government on account of the purchase, receiving and treatment of such ore or material and the shipment and selling of the products therefrom, inclusive of interest at the rate of 6 per cent. per annum, calculated from day to day from the time of payment of such expenses up to the date of the final payment of the balances to the sellers, will be paid in final completion of the purchase of such ore or material to the sellers thereof in proportion to the percentages which the values of the separate lots form of the total value of all the lots smelted from which the aforesaid products have been derived, calculating such values on the prices assumed as above for the purpose of making advances."

It was strongly urged on behalf of the appellants that no claim is maintainable under the West Australian Crown

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Suits Act except for some of the causes enumerated in s. 33, and that the claim for interest did not fall within them. Under that section the claim must for this purpose be founded upon and arise out of some one of the causes of action enumerated in that section. The first of these is: "Breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or the Executive Government of the Colony, whether such authority is expressed or implied."

There clearly was a contract between the parties to the present litigation—namely, the Crown and the owners of the mine—and that contract was one under which the Crown became the purchaser of the ore from the owner of the mine. It was urged, on behalf of the Crown, that in the absence of express stipulation, there could be no liability for interest in respect of delay in the payment of the purchase money. But in the present case the provisions of the contract as to the payment of the purchase money were of a very special kind. It was to be paid out of the proceeds of the realization of the ores by the Crown, to whose staff the ores were delivered by the mineowners for treatment and realization according to the terms of the contract contained in the regulations. The Government received and dealt with these ores as fiduciaries, and held the balance in each case, after all charges had been defrayed, for the mineowners, the present respondents. If a person who has received money in a fiduciary capacity unduly delays making payment to his beneficiary, he is accountable in equity for interest upon the amount of the principal. It cannot be doubted that on the facts of this case interest would have been payable as between subject and subject. It was, however, insisted, on behalf of the Crown, that such a liability is not covered by the Crown Suits Act, inasmuch as it arises on equitable principles, and not out of breach of contract. But in truth this liability for interest was one of the terms of the contract of sale between the mineowners and the Crown, as that contract provided for the smelting and realization of the metal from the ore being effected by the Crown, and for the application of the

proceeds as specified in the regulations. As regards the ultimate balance, it was held by the Crown in a fiduciary capacity, and liability for interest is one of the incidents of such a fiduciary capacity. The action is brought for breach of contract in respect of the terms of the contract of agency undertaken by the Crown. It appears to their Lordships that the claim is founded on and arises out of the breach of a contract within the meaning of s. 33 of the Crown Suits Act.

It is not necessary to enter into the question of misrepresentation, which is referred to in the judgment of the Court below, inasmuch as it is sufficient for the decision of this case that the Crown received this money under a contract for agency on certain terms which have not been observed. There was very considerable delay in handing over the proceeds. It would appear that this delay was due to various claims put forward by the agents of the Crown in respect of the amounts to be allowed, but there was, in the opinion of the Court below, with which their Lordships agree, no justification for the delay which took place in accounting for the proceeds.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *M. L. Moss.*
Solicitors for respondents: *White & Leonard.*

[PRIVY COUNCIL.]

J. C.* 1927 Jan. 21.

GARDNER . . . . . APPELLANT;

AND

HIRAWANU AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Landlord and Tenant—Native uncleared Land—Covenant by Lessee to cultivate—Lessee cutting and selling Timber.

The appellant was assignee of a lease of about 228 acres of native uncleared land in New Zealand for a term of forty-two years from 1919, at a rent of 4*s.* 2*d.* an acre per annum for the first twenty-one years, and afterwards at a yearly rent equal to 5 per cent. of the Government unimproved valuation plus 5 per cent. The lease contained a covenant by the lessee to cultivate, manage, and use the land in a husbandlike manner, and to keep it free and clear of noxious weeds. The land was covered with bush and, as to about forty acres, contained timber trees; it was suitable for pasturage if cleared, but until cleared it could not be cultivated. The appellant sold the timber to millers who in 1924 felled and removed it, the appellant receiving 600*l.* as the price. The respondents, as reversioners, sued the appellant for damages:—

Held, that the lessee's covenant imported an obligation to clear the land before the end of the lease, and if the timber was cut earlier than was required to fulfil that obligation the reversioners could not complain; further, that the appellant was entitled to sell the timber when cut. The action accordingly failed.

In re Rotoiti [1923] N. Z. L. R. 619 approved.

Judgment of the Court of Appeal [1926] N. Z. L. R. 48 reversed.

APPEAL (No. 84 of 1926) from a judgment of the Court of Appeal of New Zealand (October 23, 1925).

The question arising upon the appeal was whether the appellant, as assignee of a lease of native uncleared lands, was entitled under the covenants in the lease to fell and sell timber growing upon the demised property.

The facts of the case, including the material terms of the lease, appear from the judgment of the Judicial Committee.

The action was commenced in the Supreme Court, but was removed into the Court of Appeal; that Court (Stout C.J., Sim, Reed, and Adams JJ.; Ostler J. dissenting)

* *Present:* LORD SHAW, LORD WRENBURY, LORD PHILLIMORE, LORD BLANESBURGH, and SIR JOHN WALLIS.

gave judgment for the plaintiffs, the present respondents, for 600*l*. The case is reported at [1926] N. Z. L. R. 48.

1926. Dec. 1. *Myers K.C.* and *Stamp* for the appellant. *Farwell K.C.* and *F. O. Langley* for the respondents.

1927. Jan. 21. The judgment of their Lordships was delivered by

LORD WRENBURY. On August 26, 1921, the appellant became assignee and registered proprietor of a lease dated December 20, 1919. In the latter part of the year 1923 she sold and assigned the lease to one Wharawhara Topine, owner of an adjoining block. The reversioners in May, 1923, sued the appellant for damages for acts done by the appellant in January and February, 1923, whereby as they alleged the reversionary interest had been depreciated. The action was by order of July 7, 1925, removed into the Court of Appeal for argument. By order dated October 23, 1925, it was remitted to the Supreme Court with a direction that on certain parties being added as plaintiffs, judgment should be entered for the reversioners, and on February 10, 1926, the Supreme Court gave judgment for the reversioners for 600*l*. and costs. This is an appeal from the order of October 23, 1925, and consequently from the judgment of February 10, 1926.

The lease of December 20, 1919, was a lease of about 228 acres of native uncleared land in the Provincial District of Taranaki, in the North Island of New Zealand, for a term of forty-two years from August 20, 1919, at a rent of 4*s*. 2*d*. an acre for the first twenty-one years, and afterwards at a yearly rent equal to 5 per cent. of the Government unimproved valuation to be made about July, 1940, with a further 5 per cent. of the rent for the costs and expenses of the Land Board.

It contained covenants as follows :—" 3. The lessee will at all times during the said term repair and keep in good and tenantable repair and condition the said land and all improvements for the time being thereon and will at the end or sooner

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determination of the said term so deliver up the same (fair wear and tear and damage thereto by fire earthquake or tempest excepted). 4. The lessee will during the said term cultivate manage and use the said land in a husbandlike manner and will at all times keep the same free and clear of noxious weeds and will comply with the provisions of 'The Noxious Weeds Act 1908' or any amendment thereof to which an occupier is liable."

The land was unimproved and uncleared native land covered with bush, and as to about forty acres contained millable trees (totara matai, white pine and rimu)—millable trees are hereinafter called timber. Early in 1923 the appellant sold the timber to a firm of saw millers. In January and February they cut and removed it, and in payment for it gave the appellant sawn timber of the value of 600*l.* The respondents alleged that the act of felling and removal was wrongful; that their reversionary interest was materially and injuriously affected thereby; and they sued for damages for its depreciation. The judgment under appeal upheld this contention and awarded 600*l.* and 162*l.* 8*s.* costs.

The land, as has already been stated, was uncleared land. When cleared it was adapted for pasturage, but until cleared it could not be brought under cultivation. The reversioner is, no doubt, justified in saying that the timber is part of the land; that a lessee, by virtue of his lease, acquires only a special property in it; that he has not a general right to cut down and destroy it; that the general property remains in the reversioner; that the special property of the lessee is determined by severance; and that if the timber is severed from the land the property, in the absence of some further right contained in the lease, vests in the person entitled to the first estate of inheritance. The question is whether under this lease in the facts of this case the reversioner has not granted to the lessee a larger right of property—nay more, whether he has not imposed upon the lessee an obligation to cut the timber in pursuance of the lessee's covenant to "cultivate, manage and use the land in a husbandlike manner."

In the case of *In re Rotoiti* (1) Hosking J. pointed out that in New Zealand the clearing of bush country is well known as coming within the class of improvements for the purposes of the Land Acts and the legislation relating to the valuation of land, and pointed attention also to the fact that a covenant to comply with the provisions of the Noxious Weeds Act (a covenant which is contained in article 4 of this lease) would be fanciful unless clearance of the surface of the land was contemplated. Their Lordships find that in the present case the acreage of the demised land was small; that upon the evidence it was capable of carrying only about 1½ sheep to the acre; and as a farming proposition was not practical unless all the land was cleared. Mr. C. P. Smith, a witness for the plaintiffs (the reversioners), said in re-examination: "The only reasonable way to enjoy the land is by felling the bush: by that I mean, the land as a whole. That is the only method in which you could enjoy the land." The plaintiffs' evidence, in fact, comes to this: not that it would have been wrong to fell the timber at some time, but that to fell it so early and before clearing the bush elsewhere was to fell it, not for the purpose of cultivation, but with a view to making money by its sale, and that this was not justifiable. In their Lordships' opinion this contention cannot be supported. The covenant to cultivate, manage and use in a husbandlike manner imposed upon the lessee an obligation to cultivate, importing and creating an obligation to improve the land—that is to say the whole of the land—by clearance, with a view to cultivation. If the lessee unduly deferred the clearance of the land the lessor might, no doubt, complain of breach of covenant; but he has no grievance if the lessee proceeds to perform his obligation to make clearance at such early time as is most to his own benefit. The right of the reversioner is that the demised land shall be so dealt with as that all of it shall be brought under cultivation, and that at the expiration of forty-two years he shall regain possession of the land not depreciated by any act which the tenant was not entitled

(1) [1923] N. Z. L. R. 619.

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to do upon the land. If the timber might legitimately be cut at some time during the forty-two years the reversioner cannot complain of acceleration, although he might complain of delay in developing the land by clearance.

In their Lordships' opinion article 4 of the lease " may be substantially described as that of a grant by implication arising from the nature of the subject-matter in order to give effect to an evident intent that the tenant shall have the reasonable enjoyment of the subject-matter." The quotation is from the judgment in *In re Rotoiti*. (1) It was the intention of the lease that the tenant should have the use of all the land for pastoral purposes, and clearing the land was a necessary act in order to achieve that intention. Indeed, their Lordships go further and say that article 4 extends beyond the grant of a right, and creates in the lessee an obligation to make during the forty-two years a clearance of the land, including the felling of the timber in dispute.

The very detailed and careful judgment of Hosking J. in *In re Rotoiti* (1) is, in their Lordships' judgment, right. The majority in the Supreme Court do not dispute the correctness of that decision. They distinguish the present case on a ground which is, in their Lordships' opinion, erroneous. Stout C.J. says : " There were no circumstances in this case which showed that the tenant who became the assignee of a [quaere, meaning " the "] lease obtained the lease for the purpose of farming." Sim, Reed, and Adams JJ. say : " The evidence makes it clear, we think, that the cutting of the timber was not done for any such purpose " (namely, the purpose of securing the profitable enjoyment of the land), " but for the purpose of making an immediate benefit out of the timber." The learned judges here fail to give effect to the covenant to cultivate. It was impossible to cultivate without clearing. The tenant owed the duty of clearing, and as has been pointed out acceleration of the date at which the clearing is done is a thing which affected the reversioner not at all, although delay in so doing might have been a breach of covenant.

(1) [1923] N. Z. L. R. 619, 626.

The tenant having a right or being under an obligation to fell the timber, is not bound to burn it, as according to the ordinary practice he would burn the bush. He may dispose of it in the best way which circumstances allow. If he cuts and sells the timber early in his occupation he does not thereby deprive the reversioner of forty-two years later of anything. The act will, no doubt, affect the price which the lessee will obtain for the lease if he sells it, but that is a matter with which the reversioner is not concerned. It is unnecessary to consider whether the tenant would be entitled to cut and sell the timber upon the eve of the expiration of the term, say, when 41½ of the forty-two years of the term had expired. The case suggested is one which could not arise if the tenant performed the obligation to "cultivate, manage and use the land in a husbandlike manner." A compliance with that covenant necessarily involved that the timber should have been cut and removed from the land many years before that time, and, as their Lordships have already pointed out, the date of its removal is matter of indifference to the reversioner, provided that the date shall be such as that the covenant to cultivate is performed.

Their Lordships are of opinion that the judgment of the minority judge, Ostler J., is right, and that this appeal succeeds. The action should be dismissed with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.* 1927 Jan. 27.

CROWN MILLING COMPANY, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Monopoly—Flour Trade—Co-operative Selling Agency—"Contrary to the public interest"—Commercial Trusts Act, 1910 (*No.* 32 *of* 1910, *N. Z.*), *ss.* 3, 5.

The Commercial Trusts Act, 1910, of New Zealand, which applies to certain enumerated goods including flour, provides by s. 3 that an offence is committed by any one who, either as principal or agent, in respect of dealings in any goods, gives, offers, or agrees to give to any person any rebate, or other valuable consideration for the reason, or upon the express or implied condition, that the latter person does or does not do any of certain things specified; and s. 5 makes criminal any conspiracy to monopolize or control the demand or supply of any goods "if such monopoly or control is of such a nature as to be contrary to the public interest."

A company incorporated to act as selling agents for flour millers entered into an agreement with each of various flour millers whereby the company exclusively was to sell on the miller's behalf, the agency being a del credere agency at 5 per cent. commission, subject to modification.

The Crown sued four flour millers, who had entered into the agreement, and the agency company, for penalties under the above Act, and for an injunction:—

Held, that no offence under the Act was proved. Sect. 3 applied only to cases in which the consideration was given, or the promise made, to another party to the "dealing," and the agency company was merely agent for the millers; and the evidence did not establish that the monopoly or control was in fact of a nature contrary to the public interest so as to be an offence under s. 5.

Judgment of the Court of Appeal [1925] N. Z. L. R. 753 reversed.

APPEAL (No. 78 of 1926) from a judgment of the Court of Appeal of New Zealand (September 26, 1925) reversing a judgment of Sim J. (March 3, 1925).

Proceedings were brought in the Supreme Court of New Zealand to recover from the appellants penalties under

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD WRENBURY, LORD DARLING, and SIR JOHN WALLIS.

Commercial Trusts Act, 1910, of New Zealand for an alleged infraction of s. 5 of that Act, and for an injunction.

The facts of the case and the material terms of the Act appear from the judgment of the Judicial Committee.

At the trial it appeared that the selling agency complained of comprised all the flour-milling concerns in New Zealand, with the exception of three mills in the Auckland district, and three small mills in the South Island. It was not disputed that the combination involved the formation of a "commercial trust" and a "partial monopoly" within the meaning of the Act, the controversy being whether the agreement either intrinsically, or having regard to the evidence, was "contrary to the public interest" so as to be an infraction of s. 5 of the Act. The Crown called evidence with a view to show that the working of the agreement resulted in an increase in the price, and a depreciation in the quality, of the flour obtainable; also that it resulted in retailers finding it difficult to obtain the brands which they wanted. It was contended also that the operation of the scheme involved infractions of s. 3 of the Act, and consequently that it was per se "contrary to the public interest" within s. 5.

The trial judge (Sim J.) dismissed the action. The Court of Appeal by a majority (Stout C.J., Reed and MacGregor JJ.; Herdman and Alpers JJ. dissenting) reversed the decision. A penalty of 500*l.* was imposed upon each of the defendants, and an injunction was granted. The proceedings in New Zealand are reported at [1925] N. Z. L. R. 258, 753; the views of the learned judges appear shortly from the judgment here reported.

1926. Dec. 6, 7, 9, 10. *Myers K.C.*, *Stamp* and *W. D. Campbell* for the appellants.

Sir John Simon K.C., *F. O. Langley* and *Joan Clarkson* for the Crown.

[Reference was made to *Merchants Association of New Zealand* v. *The King* (1); *Attorney-General of Commonwealth*

(1) (1913) 32 N. Z. L. R. 1233.

J. C. 1927 CROWN MILLING CO. v. THE KING.

v. *Adelaide Steamship Co.* (1) ; and *North Western Salt Co.* v. *Electrolytic Alkali Co.* (2)]

1927. Jan. 27. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This case raises questions of great importance with regard to the construction and effect of the New Zealand Act, 1910, No. 32, which came into operation on January 1, 1911. It is entitled "An Act for the Repression of Monopolies in Trade or Commerce," and is cited as "the Commercial Trusts Act, 1910."

This Act is directed against what are known as commercial trusts. In s. 2 "commercial trust" is defined as meaning any association or combination of persons having as an object : "(*a*) (i) Controlling, determining, or influencing the supply or demand or price of goods in New Zealand or elsewhere ; or (ii) of creating or maintaining in New Zealand . . . . or elsewhere a monopoly whether complete or partial in the supply or demand of any goods, or (*b*) acting in New Zealand or elsewhere with any such object as aforesaid."

The Act applies only to goods mentioned in the schedule, which has been amended by subsequent Acts, and includes in its enumeration many of the principal necessaries of life.

The most important of the enacting clauses are ss. 3 and 5. Sect. 3 makes it an offence to give or offer in respect of any dealings in goods any valuable consideration : "(*a*) For dealing exclusively with any person or class of persons ; (*b*) For not dealing with any person or class of persons ; (*c*) For restricting dealings with any such person or class ; (*d*) For being, or becoming, a member of a commercial trust ; or (*e*) For acting under the direction of any commercial trust with regard to the sale, purchase or supply of goods."

Sect. 5 makes criminal any conspiracy to monopolize or control the demand or supply in New Zealand of any goods, if such monopoly or control is of such a nature as to be contrary to the public interest.

(1) [1913] A. C. 781. (2) [1914] A. C. 461.

There are other sections of a subsidiary nature to which reference has been made, particularly ss. 4, 6, 7 and 8. Provision is also made for the infliction of a penalty for offences against the Act, and for the granting of injunctions: ss. 10 and 13.

The present proceedings were instituted against the Crown Milling Co., Ld., of Dunedin, and three other companies carrying on business in New Zealand as flour millers. A company entitled Distributors, Ld., of Christchurch, flour millers' agents, were also joined as defendants.

The statement of claim charged against the defendants conspiracy in breach of s. 5 of the Commercial Trusts Act, and set out the agreement entered into in furtherance of the conspiracy alleged. The defendants denied that there had been any infraction of the Act, and alleged that so far from prejudicing the trade, what had been done by the defendants had been beneficial in its operation.

The case came on for hearing before Sim J. in the Supreme Court of New Zealand, and after a trial which lasted for ten days Sim J. gave judgment in favour of the defendants. An appeal was brought against this decision to the Court of Appeal in New Zealand. and after a hearing before five judges, being the first and second divisions of the Court of Appeal sitting together, the Court by a majority set aside the decision of the Supreme Court, and entered judgment for the Crown. The Court consisted of five members: Stout C.J., Herdman, Reed, MacGregor and Alpers JJ., the majority consisting of three judges. The defendants by this appeal to His Majesty in Council ask that the judgment of Sim J. should be restored.

The object of these proceedings was to put an end to a combination of flour millers in New Zealand, the nature and objects of which are stated in the form of agreement scheduled to the statement of claim.

The company, known as Distributors, Ld., was incorporated for the purpose of acting as agent for the millers in the campaign which it was proposed to initiate against the evils from which the trade in flour, etc., was alleged to suffer.

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They cannot be better stated than in the language of the preamble to the agreement, adhesion to which it was the office of Distributors, Ld., to promote. The parties to this agreement were, on the one hand, the mill owners who signed it, and, on the other, Distributors, Ld. The preamble is as follows :—

"Whereas the company is incorporated with powers to buy, sell, deal in, and act as agent for the sale of wheat, flour, and other products of milling and cereals : And whereas by the unnecessary multiplicity of marketing and distribution processes the cost of producing, marketing, and distributing flour by flour millers individually is unnecessarily expensive, and results in the net price obtainable by flour millers being unremunerative : And whereas, with a view to minimizing necessary and eliminating unnecessary expenses to individual flour millers, the company is prepared to use its organization for the purpose of canvassing for orders, issuing invoices to purchasers, and marketing and distributing flour sold, and otherwise acting as agent in respect of the sale of flour and such other products as aforesaid : And whereas, by reason of difficulties in finance arising from delays and failures in payment by purchasers of flour from flour millers, it is advisable that adequate protection should as far as practicable be obtained against sales to purchasers who are insolvent or unable to pay for flour purchased within a reasonable time : And whereas the company is in a position to dispose of flour to better commercial advantage than can be obtained by individual flour millers, having regard to the difficulties aforesaid : And whereas the said mill owners are the owners of a certain flour mill situated at . . . ., and hereinafter called 'the said mill' : And whereas the said mill owners have agreed that the company shall act as their sole agent for the sale of flour and its by-products, upon the terms and subject to the provisions hereinafter contained : And whereas the company in consideration thereof has agreed to extend to the said mill owners the advantages it possesses in the marketing and distribution of such flour : Now, this agreement witnesseth that the parties hereto do hereby, in consideration

of their mutual covenants and agreements hereinafter contained and implied, mutually covenant and agree in manner following, that is to say :—"

Then follow the details of the agreement. Distributors, Ld., were to sell on behalf of the mill owners (clause 3 (*a*)), the agency was to be exclusive (clause 4) and was to be in the nature of a del credere agency at 5 per cent. commission, subject to modification (clause 7). The price was to be fixed by the directors of the company (clause 11) and arrangements were to be made for the equitable distribution of the trade (clauses 12 and 13). There were a number of other provisions which it is not necessary to state in detail, and provision was made for the final settlement of any dispute which might arise in carrying them out by reference to arbitration (clause 31).

There has been a singular difference of judicial opinion in this case. Of the six judges who took part in it, one who formed the Court of first instance and five in the Court of Appeal, three were in favour of the Crown and three in favour of the defendants. The defendants thus succeeded in the Court of first instance, where Sim J., sitting alone, was in their favour, but the Crown succeeded in the Court of Appeal, where three were in favour of the Crown and two in favour of the defendants.

It will be convenient in the first instance to state shortly the conclusions at which their Lordships sitting on this Board have arrived, and the principles on which it appears to them that the decision must depend, and then to proceed to an examination of the conflicting views expressed in the judgments in the Courts below.

In order that the Crown may succeed in this case, it is necessary to show that there had been an offence either under s. 3 or under s. 5 of the Commercial Trusts Act, 1910, there being no other sections in the Act which for the purposes of the present case would constitute an offence.

Sect. 3 of the Act runs as follows :—

" 3. Every person commits an offence who, either as principal or agent, in respect of dealings in any goods,

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gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person—(*a*) Deals or has dealt or will deal, or intends or undertakes or has undertaken or will undertake to deal, exclusively or principally, or to such an extent as amounts to exclusive or principal dealing, with any person or class of persons, either in relation to any particular goods or generally; or (*b*) Does not deal or has not dealt or will not deal, or intends or undertakes or has undertaken or will undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally; or (*c*) Restricts or has restricted or will restrict, or intends or undertakes or has undertaken or will undertake to restrict, his dealing with any person or class of persons, either in relation to any particular goods or generally; or (*d*) Is or becomes or has been, or has undertaken or will undertake to become, a member of a commercial trust; or (*e*) Acts or has acted or will act, or intends or undertakes or has undertaken or will undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods."

In the opinion of their Lordships the facts of this case do not disclose any infraction of s. 3. That section provides that an offence is committed by any person who, either as principal or agent, in respect of dealing in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward or other valuable consideration for the reason, or on the express or implied condition that the latter person does or does not do any of the things specified under heads (*a*), (*b*), (*c*), (*d*) and (*e*) in that clause.

The agreement of flour millers with Distributors, Ld., is said to show an offence under this section. If Distributors, Ld., fell within the description of "other person" mentioned in the first sentence of clause 3 as the person to whom the

consideration is given or promised, there would be abundant evidence of such an infraction. But the position of Distributors, Ld., was that of mere agents for the millers, who were parties to the dealing in goods in respect of which the provisions of s. 3 come into play. In the opinion of their Lordships that section applies only to cases in which the consideration was given or the promise made to another party to the "dealing." Sect. 3 has no application to the case of an advantage given or promised by or on behalf of one of the parties to the dealing to his own agent. The essence of the offence in s. 3 is that the advantage must have been given or promised to a party to the dealing. It follows that the prosecution cannot rely upon s. 3.

Sect. 5 remains for consideration. It runs as follows :—

"Any person who conspires with any other person to monopolize wholly or partially the demand or supply in New Zealand or any part thereof of any goods, or to control wholly or partially the demand or supply or price in New Zealand or any part thereof of any goods, is guilty of an offence if such monopoly or control is of such a nature as to be contrary to the public interest."

This clause deals with conspiracy to monopolize in New Zealand the demand or supply of any goods or to control the demand, supply or price, "if such monopoly or control is of such a nature as to be contrary to the public interest." It is upon these last words that there has been in the Courts below so great a difference of opinion. The question is whether the monopoly or control which it was the object of the defendants to establish was of such a nature as to be contrary to the public interest. The legislature has not attempted to define the class or classes of monopoly or control which are to be deemed contrary to the public interest within the meaning of this clause. The Courts have to decide this question for themselves.

It is apparent that the effect of the Act is not to treat every monopoly or control as necessarily contrary to the public interest. No offence is committed against the enactment unless the maintenance or control is of such a nature

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as to be contrary to the public interest. The most obvious form of prejudice to the public interest would be if the effect of the monopoly were to cause an unreasonable rise of price in articles which are necessaries of life. There are in the Act sections dealing with the exaction of unreasonable prices fixed under the influence of any "Commercial Trust," e.g., ss. 6 and 7, but it is not charged against the defendants in the present case that the prices have been raised to an unreasonable point within the meaning of any such provision.

Of course, if the legislature of New Zealand or of any part of His Majesty's Dominions had enacted that any particular acts or omissions should stamp any monopoly or control as contrary to the public interest, every Court would be bound to give effect to such a law. But with regard to the transactions with which their Lordships are now concerned, the legislature has not taken this course; it is left to the Courts to ascertain in each case whether the nature of the monopoly or control is contrary to the public interest as a matter of fact, or as a matter of law under some provision of the law, whether common law or statute.

It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy. Strong views may be entertained on the one side or on the other, but the one material question here is whether the monopoly or control is of such a nature as to be contrary to the public interest. The burden of establishing this is, of course, upon the party who asserts that the monopoly or control is of such a nature.

It is clear that the legislature had in view that there might be cases of monopoly or control which would not be contrary to the public interest, and that it is so contrary must be established in each particular case of prosecution in which it is sought to prove an offence under the Act. The burden of proof is, of course, upon the person who asserts any proposition, and this applies with special force when, as here, the commission of crime is in question. Their Lordships do not think that this proposition has been established in the present case, and for this reason, in their

opinion, one essential element in the case for a successful prosecution is wanting. The point is one upon which opinions may differ, as a reference to the judgments of the Courts below in the present case will abundantly show.

It is now necessary to consider the course which the case has taken and the grounds on which the various judges arrived at their conclusions.

In the Court of first instance Sim J. dealt first with s. 3 of the Commercial Trusts Act, 1910. He pointed out that the agreement here is for the appointment of an agent for the sale of goods, not an agreement for the sale of goods, as in the *Coal Vend* case (*Adelaide Steamship Co.* v. *The King* (1) and *Attorney-General of Commonwealth* v. *Adelaide Steamship Co.* (2)), which had been relied on for the Crown. Sim J. goes on to consider whether the monopoly and control in the present case are of such a nature as to be contrary to the public interest under s. 5. He gives the history of the agreement between the millers, which formed the subject of the prosecution, and on his consideration of the evidence held that the Crown had failed to establish its case. He therefore gave judgment for the defendants.

The case was taken on appeal to the Court of Appeal in New Zealand. The judgments revealed great diversity of view, not only as to the answer to be given, but also as to the point of view from which the question should be considered.

Stout C.J. says: "It cannot therefore, in my opinion, be said that this contract was not of" "[such] a nature as to be contrary to the public interest. First, the Distributors Co. had the power of fixing the price; second, it had the power of fixing the amount of production, and where the production was to take place at different parts of the Dominion, and it had the power of declaring that flour produced in New Zealand must be exported (see paragraph 5). It was therefore a contract of such a nature as to be contrary to the public interest." And, further on, he said: "It is

(1) (1912) 15 C. L. R. 65. (2) [1913] A. C. 781.

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surely not necessary to show that the monopoly and control of food and its price are contrary to the public interest."

He therefore held that the offence had been committed under s. 5 of the Act.

Herdman J., on the other hand, held that no offence under s. 5 had been proved, and pointed out that because there is some restraint of trade, it does not necessarily follow that a contract is detrimental to the public interest. In his opinion, no offence against the Act had been committed, as it was not shown that what had been done was prejudicial to the public.

Reed J. arrived at the same conclusion as the Chief Justice, though not quite for the same reasons: "It is urged that this is necessary to the life of the flour-milling trade, that unrestricted competition in the past resulted in fluctuating prices of flour and, in some cases, in sales below a remunerative price.

"No doubt the law will uphold, in exceptional cases, an anti-competitive contract if it is clearly shown that unrestricted competition will result in ruin to private interests, and an ill-regulated supply, for such cannot be of advantage to the public. In the *Salt* case" (*North Western Salt Co.* v. *Electrolytic Alkali Co.* (1)) "Viscount Haldane L.C. said as follows (1): 'An ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view.'"

In the result Reed J. gave judgment for allowing the appeal. After adverting shortly to the evidence as to the history of flour milling in New Zealand, he went on to say: "As, for eighty years, with open and unrestricted competition, flour millers were able to carry on without the suggested dire results following, it would require the most cogent evidence that circumstances had so changed that at the present day it would be ruinous to private parties engaged

(1) [1914] A. C. 461, 469.

in the industry if a return to such unrestricted competition were made, before the Court should assist in imposing upon the public such an extremely detrimental monopoly. The evidence called entirely failed in that respect. For these reasons I think the appeal should be allowed."

MacGregor J. was of opinion that the judgment of Sim J. should be reversed. He said, with reference to Government control of flour supplies, that it was originally a war measure adopted in 1917, when shipping was almost unprocurable. This control had been continued year after year until apparently it had become intolerable, and after a reference to the evidence, went on: "Is it not abundantly plain from all this that the aim and object of the flour millers was, when the Government monopoly ceased, to fasten on the public of New Zealand in their own interest a similar measure of monopoly, not public, but private, not conceived from any motive of public policy, but wholly self-serving and contrary to the public interest? In other words, they deliberately conspired together to perpetuate under their own control the State monopoly which the Government itself was about to abandon as undesirable in the public interest." And he goes on to say: "A mass of evidence was produced in support of and against these grave allegations. I need not refer to that evidence in detail. In the result, I am of opinion that the main charges made by the Crown have been established as against the respondents. In most cases, indeed, the facts were indisputable."

Alpers J., at the commencement of his judgment, says: "Three questions fall to be discussed on this appeal . . . . in my opinion, each of these questions should be answered in the negative." He also expressed his agreement with the judgment of Herdman J., which already has been adverted to in this opinion. On the third question he expresses his agreement with the view of Sim J., trial judge.

In the result this case, which has occupied so much time in its progress through all the Courts, resolves itself into one question—namely, Has the prosecution established that on the facts of this partieular case the monopoly or control was

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of a nature contrary to the public interest? The question is, of course, such as to lend itself to prolonged discussion, and it has been fully and ably argued on both sides. In their Lordships' opinion, the question in the circumstances of the present case is really one of fact and cannot be decided merely as a matter of law. Their Lordships, after reviewing and weighing the evidence, have come to the conclusion that the prosecution has not discharged the burden of proof which lies upon it, and that the judgment of Sim J. should be restored. The respondent should pay the costs of the appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Pontifex, Pitt & Co.*
Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 *Dec.* 10.

GEORGE BANHAM AND COMPANY, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

F. REDDAWAY AND COMPANY, LIMITED, AND ANOTHER . . . . } RESPONDENTS.

Trade Mark—Registration—Distinctive Mark—"Adapted to distinguish"—User in foreign Countries—No User on Goods sold in United Kingdom—Discretion of Registrar—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 11, 12, 19.

An applicant for registration of a trade mark has no absolute right, in cases where registration is not prohibited by the Trade Marks Act, 1905, to have the mark registered, but the registrar has a discretion whether to register or not, and the Court will not interfere with his discretion except where he has gone clearly wrong.

Eno v. *Dunn* (1890) 15 App. Cas. 252 applied.

"Adapted to distinguish" means adapted to distinguish in this country, having regard to the practice and conditions of the trade here.

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* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD WRENBURY, and LORD BLANESBURGH.

An application by a firm of canvas hose manufacturers to register, in respect of hose, a trade mark consisting of three parallel red lines woven in the hose throughout its whole length was opposed by several rival firms, and registration was refused by the registrar. The applicants had not used this mark on goods sold in this country, but had used it for many years on goods exported to other countries, where it had become identified with their goods. In 1914 the applicants obtained registration of a trade mark for hose consisting of two blue lines with a red one between them running the whole length of the hose, on proof that the mark had been used by them for many years in this country. The opponents proved that the use of coloured lines running the length of the hose was prevalent in the trade, and that in many cases these lines were put on the hose at the order of a customer to indicate ownership or to distinguish one set of hose from another:—

Held that, in the circumstances, the proposed mark was not adapted to distinguish the goods of the applicants, and that the registrar had rightly refused registration.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Sargant L.JJ.) reversing an order of Tomlin J., whereby he affirmed the refusal of the Registrar of Trade Marks to register a trade mark No. 420,023.

The facts sufficiently appear from the opinion of Viscount Dunedin, and they are summarized in the headnote.

1926. July 9, 12, 13, 15. *Whitehead K.C.* (with him *Trevor Watson*) for the appellants. The appellants do not contend that the respondents' mark is not registrable matter, but when it comes to a question whether the mark ought to be registered the environment of the mark has to be considered, and in the circumstances of this case the registrar was right in refusing to register the mark as being not adapted to distinguish the goods of the respondents from those of other persons. For many years coloured lines woven in the hose throughout its whole length have been used in the trade to indicate the ownership of the hose upon which they were woven, or to distinguish different qualities of hose, irrespective of its origin, and it has been usual for customers to order from different manufacturers hose marked with such coloured lines to suit their own requirements. In view of this practice no coloured lines ought to be registered without proof of actual distinctiveness acquired by user in this country:

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Registrar of Trade Marks v. *W. & G. Du Cros.* (1) In 1914 the respondents obtained registration in respect of hose of a trade mark consisting of two blue lines with a red line between them to be woven into the hose throughout its whole length, but Warrington J., in directing the registrar to proceed with the registration based his judgment on the fact that the mark had been used by the respondents for many years on goods manufactured for the home market and had in fact become distinctive of their goods: *In re F. Reddaway & Co.'s Application.* (2) That case therefore does not hurt the appellants. As to proof of distinctiveness in the United States, "adapted to distinguish" means adapted to distinguish in this country having regard to the conditions of the trade here, and evidence of user in a foreign country, though it may be some evidence of an inherent quality of distinctiveness, cannot be evidence that the mark is adapted to distinguish in the market of this country. The conditions of the market may be so different that a mark capable of acquiring distinctiveness in one country may not be so capable in another country. For example, the custom of using like marks for purposes other than origin does not exist in America. The user must be user in the United Kingdom: *In re Neuchatel Asphalte Company's Application* (3); *In re Diamond T. Motor Car Company's Application* (4); *In re Gallaher's Application.* (5)

Sir Douglas Hogg A.-G. (with him *Dighton Pollock*) for the Registrar of Trade Marks argued in support of the appeal.

Sir Duncan Kerly K.C. and *R. Moritz K.C.* for the respondents. The respondents are entitled to register this mark on the footing that it is a new mark in this country. It has been found in practice in the canvas hose trade that the only convenient and effective method of marking which will be distinctive of origin is to weave into the substance of the hose combinations of coloured warp threads extending throughout its whole length, and this method has been

(1) [1913] A. C. 624, 634.
(2) [1914] 1 Ch. 856.
(3) (1913) 30 R. P. C. 349, 357–8.
(4) (1921) 38 R. P. C. 373, 382.
(5) (1924) 42 R. P. C. 215.

generally adopted in England and in America. The objection that coloured lines are used for other purposes is beside the mark. If it were shown that there was an unbroken practice in the trade to use coloured lines to indicate ownership that might create a difficulty, but such user, on the evidence, is occasional only, and coloured lines are also used to denote origin. The respondents themselves have so used these for thirty years. In fact the Admiralty get hose supplied by the respondents with a single blue line denoting both ownership and origin. The evidence shows that no common practice is established in the trade that coloured lines denote ownership or anything but origin. If the three red lines are not registrable as a new mark, they can be made registrable by proof that they have become distinctive of the respondents' goods in the United States and Canada. Distinctiveness should be considered in the market where the mark is intended to be used. In *Orr Ewing* v. *Registrar of Trade Marks* (1), where the appellants had applied for registration, the question turned upon whether the mark was distinctive in India. In *Johnston & Co.* v. *Orr Ewing & Co.* (2), which was an action by the same firm in respect of their common law right, there was no reference to any user in this country, and an injunction was granted to restrain the use by the defendant of a mark in this country, because it would lead to deception in the Indian market. This contention of the respondents does not of course apply to any mark as to which there is a positive objection to register in the United Kingdom. Accordingly where a mark is in common use in this country, it cannot be taken out of that use by showing that it has acquired distinctiveness in a foreign country. That is all that *Gallaher's* case (3) decided, but, though the decision was right, the reasoning was wrong. Similarly, if a mark has been appropriated by some one else, no amount of foreign user will assist the respondents. It is said that there can be no title to registration unless the goods are intended to be

(1) (1879) 4 App. Cas. 479.
(2) (1882) 7 App. Cas. 219, 226, 228, 232.
(3) 42 R. P. C. 215.

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sold in this country. But in *In re Trade-mark of La Société Anonyme des Verreries de l'Etoile* (1) Stirling J. expressed an opinion to the contrary. That has never been questioned, and his decision was affirmed in the Court of Appeal. As to the limitation of the user, having regard to s. 12, sub-s. 2, of the Trade Marks Act, 1905, as amended by the Act of 1919, there can be no question as to jurisdiction of the registrar to add a note limiting the user of the mark to goods for sale in the United States and Canada. That note does not affect the obligation of other manufacturers not to use three red lines on their hose. But, on the other hand, the respondents must not use the mark on goods for sale in this country. The amendment of s. 12, sub-s. 2, of the Act of 1905 by the Act of 1919 was the result of *In re Crispin's Application* (2), where it was held that there was no power to impose a geographical limitation as a condition of registration.

Trevor Watson in reply. Sir Duncan Kerly put two limitations on his general proposition: (1.) That the mark must not be appropriated by some one else; (2.) that it must not be common to the trade; but he should have added a third—namely, that the mark, though not at present conflicting, must not be conflicting in the future in the ordinary course of trade: *Registrar of Trade Marks* v. *W. & G. Du Cros.* (3) If there is anything which would prevent the mark being distinctive in this country in the future, that is fatal. It is said that there is a great hardship in preventing registration of a mark which has earned distinctiveness abroad, and it is said that this has been considered by the Patent Office. That is true; but only for the purpose of creating a disability. For example, where objection is taken that, though a mark is distinctive in this country it is not distinctive abroad, a limitation may be imposed upon the user of the mark. But so far the Patent Office has not been invited to say that, though a mark is not distinctive in this country, it may be registered because it is distinctive abroad.

(1) [1894] 1 Ch. 61, 67; [1894] 2 Ch. 26.

(2) (1917) 34 R. P. C. 249, 349.

(3) [1913] A. C. 624, 634.

[LORD SHAW OF DUNFERMLINE. The question is whether, in the case of a mark not distinctive here but distinctive abroad, the registrar was not right in the exercise of his discretion in refusing registration : *Eno* v. *Dunn.* (1)]

It is a startling proposition that this monopoly right, which, after all, is territorial, should be sought for the purpose of enforcing a monopoly in another country.

The House took time for consideration.

1926. Dec. 10. VISCOUNT DUNEDIN (read by LORD SHAW OF DUNFERMLINE). My Lords, on October 29, 1921, the respondents (Reddaway) applied for registration of a trade mark. The mark was to be used in connection with hose for conveying water, and consisted of three parallel red stripes of lines extending the whole length of the hose. The application was opposed by the appellants, who are also manufacturers of hose, as they alleged that in the circumstances the mark was not distinctive and ought not to be registered. The registrar refused to register the mark. Appeal was taken, and his decree was confirmed by Tomlin J. Appeal was taken to the Court of Appeal, who reversed the decree of Tomlin J., and remitted to the registrar to proceed to register the mark, with a note based on a concession of the respondents that it should only be used in Canada and the United States. Appeal has been taken to your Lordships' House, and the Attorney-General has intervened wishing that the original determination of the registrar should be confirmed. Evidence was led before the registrar at great length, and additional evidence before Tomlin J.

For the purposes of this judgment it is, I think, only necessary to state five points which the evidence as I read it disclosed :—

(1.) There had been no use of the mark by the applicants on goods sold in this country. It was, therefore, an application based on the view that the mark in itself was distinctive, that it had not, as the applicants alleged, been used by others, and that it ought to be registered.

(1) 15 App. Cas. 252.

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(2.) The applicants are already the registered holders of a trade mark used in the same class of goods. It consists of two blue lines with a red one between them parallel and running the whole length of the hose. This registration was granted by Warrington J. in 1914 upon evidence that this mark had been used by the applicants in this country and had become by user identified in the market with their goods.

(3.) It was proved that the use of lines and stripes running the length of the hose was prevalent among many users of hose and was in some cases put on hose at the order of the customer either to indicate the ownership of the hose or to distinguish one set of hose from another. Instances of the former case are supplied by the Admiralty, who order hose to be supplied to them with a line of particular colour showing a different colour to different manufacturers, and instances of the latter by some fire authorities, who have a distinguishing set of lines to discriminate the hose belonging to one fire engine from those belonging to another.

(4.) The applicants led evidence to show that the mark for which registration was asked had been used by them in America, Canada and Germany, and had come to be identified with their goods in those countries.

(5.) Though three red lines had not been used by any manufacturers in this country, two and four red lines had so been used.

My Lords, the registration of a proposed trade mark is not an absolute right. It is a privilege, a privilege which under certain circumstances so far approximates to an absolute right that it must be granted. But in cases where there is at least a question whether the proposed trade mark fulfils the conditions laid down by the Act, it is not an absolute right. This was laid down in this House very clearly so long ago as 1890, in the case of *Eno* v. *Dunn*. (1) No doubt that case was decided upon the Trade Marks Act of 1883, but the provisions as to the position of the Comptroller are really identical with the provisions as to the position of the registrar under the Act of 1905. There was in that case a divergence

(1) 15 App. Cas. 252, 254, 256, 261, 263.

of opinion on the merits, but on the point for which I cite it there was unanimity. Thus, Halsbury L.C., who was in the minority, says: "While I agree that no absolute right to the registration of a trade-mark is given to an applicant for registration, the meaning and intent of the statute itself is that, unless for some of the reasons contemplated by the statute there is an objection to the registration, the trade-mark ought to be registered."

Lord Watson, who was in the majority, said: "The statute nowhere confers an absolute right to register a trade-mark."

Lord Herschell says: "The case was argued on behalf of the respondent as if he had an absolute right to have any trade-mark registered which was not proved to fall within the terms of the 72nd or 73rd section of the Act" (these were the "calculated to deceive" sections). "I do not so read the statute. Those sections prohibit the registration of a trade-mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade-mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised."

Lord Macnaghten speaks of the comptroller "to whom in the first instance is committed the 'discretionary power,' as it is termed in the Act, of registering a trade-mark." He cites s. 94, which is the corresponding section to s. 53 in the present Act.

Now, it is true that an appeal lies from the decision of the registrar, but in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case. I look upon the word "distinctive" in the Act not as a scientific definition which may be explained and commented on by judges, but rather as the indication

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of a practical standard to which the registrar is bound to conform. I quote the words used by Lord Shaw in *Du Cros'* case (1): "I should describe the duty of the Registrar as this: that examining the particular facts, he has also to survey the possible confusions or difficulties which might arise in consequence of the grant of the trade-mark, or the possible impairment of the rights of innocent traders to do that which, apart from the grant, would be their natural mode of conducting their business."

And Lord Parker, in the same case, says this: "The question, therefore, is whether the mark itself, if used as a trade-mark, is likely to become actually distinctive of the goods of the person so using it. The applicant for registration in effect says: 'I intend to use this mark as a trade-mark, i.e., for the purpose of distinguishing my goods from the goods of other persons,' and the registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant, quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of success in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some other mark nearly resembling it, upon or in connection with their own goods."

The fact which influenced the registrar here was the clearly proved use by other traders of lines running the length of the hose. He treated it as I think he should have treated it—as a practical question. Sargant L.J. says that the marks so used were not trade marks, but the relevancy of them, to my mind, is not that they were trade marks, but that they were marks, and being ordinarily used as such the registrar came to be of opinion that there would not be distinctiveness in the mark sought to be registered by the applicant.

My Lords, the cause of my disagreement with the Court of Appeal lies (1.) in the fact that they do not look at the question from what I think was the right point of view,

(1) [1913] A. C. 624, 631, 634.

i.e., whether the registrar had really gone so wrong as to make it necessary to interfere with his discretion; and (2.) in the fact that they considered the matter exclusively from the point of view of whether it could be said that the mark was calculated to deceive, leaving out the further question as explained by Lord Herschell in the passage above quoted.

Now, if the mark is one to which registration has been rightly refused if for use in this country, does it become registerable because the applicant consents to a condition that he will only use it in certain other specified places? I think Tomlin J., was right when he said: "I think, first, that 'adapted to distinguish' means 'adapted to distinguish in this country' having regard to the practice and conditions of the trade here." It is one thing to limit the use, if desired, of a trade mark registered in this country by declaring it is only to be used in certain countries besides this: it is quite another to try and make a mark ex hypothesi unregisterable here effective as a trade mark elsewhere by saying that its use would be applied to certain other specified countries. The whole idea of a trade mark register is for use in this country, and I cannot think that merely affixing the mark in this country when ex hypothesi that mark when affixed cannot be used in this country at all meets the intendment of the Act.

One word as to the evidence led that the mark had by user the significance of denoting the appellants' goods in other countries. Here again, I agree with Tomlin J., who says: "Though evidence of user in another country may be some evidence of an inherent quality of distinctiveness, it cannot be evidence that the mark is adapted to distinguish in the market of this country."

I am therefore of the opinion that the appeal should be allowed and the judgment of Tomlin J. and the registrar restored.

LORD SHAW OF DUNFERMLINE. My Lords, I have read the judgment of my noble and learned friend Viscount Dunedin and I agree with it.

LORD SUMNER. My Lords, I agree.

H. L. (E.)

1926

GEORGE BANHAM & Co. v. F. REDDAWAY & Co.

LORD BLANESBURGH. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, I am asked to say that my noble and learned friend Lord Wrenbury also agrees with this judgment.

Order of the Court of Appeal reversed and order of Tomlin J. restored. The respondents, F. Reddaway & Company, Limited, to pay to the appellants and to the Registrar of Trade Marks the costs respectively incurred by them in the courts below and in respect of the appeal to this House, and to pay to the appellants the costs of the proceedings before the registrar. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 10, 1926.

Solicitors for the appellants : *Bristows, Cooke & Carpmael.*

Solicitors for the respondents, F. Reddaway & Company, Ld. : *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester.*

Solicitor for the respondent, the Registrar of Trade Marks : *Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

INGLE . . . . . APPELLANT; H. L. (E.)*

AND

1927

FARRAND . . . . . RESPONDENT. *Feb.* 24.

Revenue—Income Tax—Office or Employment—Second-class Clerk in employ of London County Council—Assessment under Sch. E or Sch. D—Additional Assessment under Sch. E—Statute—Retrospective Operation—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 125—*Finance Act*, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 18, *sub-ss.* 1 *and* 6.

The appellant, a clerk in the employment of the London County Council, was assessed in December, 1921, to income tax in respect of his employment for the tax year 1921–22 under Sch. E, although at that time he ought to have been assessed under Sch. D, and this assessment became final and conclusive in January, 1922. Sect. 18 of the Finance Act, 1922, which was passed in July, 1922, provided, by sub-s. 1, that such profits arising from an office or employment as were chargeable to income tax under Sch. D should cease to be so chargeable and should be chargeable under Sch. E, and, by sub-s. 6, that the provisions of sub-s. 1 of the section "shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two," in respect of any employment under certain classes of employers mentioned in r. 6 of the rules applicable to Sch. E, which included the appellant's employers. A revision of the appellant's salary and bonus had increased his income for the tax year 1921–22, and accordingly, in October, 1922, an additional assessment under Sch. E in respect of this increase was made upon him under s. 125 of the Income Tax Act, 1918, on the ground that he had been undercharged in the first assessment. In fact the appellant had already paid under Sch. E more than if he had been properly assessed under Sch. D, assuming that the revised salary and bonus were included:—

Held (by Viscount Cave L.C., Viscount Sumner, Lord Shaw of Dunfermline, and Lord Carson; Lord Atkinson dissenting), that the retrospective operation of sub-s. 6 of s. 18 of the Finance Act, 1922, did not validate the additional assessment.

Decision of the Court of Appeal [1925] 2 K. B. 728 reversed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Atkin L.JJ.) (1), reversing an order of Rowlatt J. which reversed a decision of the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Martin-in-the-Fields in the county of Middlesex.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT SUMNER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD CARSON.

(1) [1925] 2 K. B. 728.

H. L. (E.) 1927 INGLE v. FARRAND.

The facts are stated in the report of the case before the Court of Appeal and in the opinion of the Lord Chancellor and they are summarized in the headnote.

1926. Dec. 9, 13. *Konstam K.C.* (with him *Ridsdale*) for the appellant. The first assessment made on the appellant for the year 1921–22 should have been made under Sch. D, and if it had been made under that schedule, even assuming that the revised bonus and salary were included in the assessment, the appellant would have had to pay less than he has in fact paid. The appellant having been overcharged and not undercharged, there is no ground for assessing him in an additional assessment under s. 125 of the Income Tax Act, 1918, in respect of the tax year 1921–22. [He referred to *Berry* v. *Farrow* (1); *Rex* v. *Kensington Income Tax Commissioners* (*Ex parte Aramayo*) (2); *Rex* v. *Bloomsbury Income Tax Commissioners*. (3)] Sect. 18 of the Finance Act, 1922, does not authorize the making of any first or additional assessments, but merely prescribes the mode of dealing with an additional assessment validly made under s. 125 of the Income Tax Act, 1918, independently of s. 18 of the Act of 1922. On the true construction of sub-s. 6 of s. 18 the retrospective effect of sub-s. 1 cannot be extended to profits or gains charged to tax in a first assessment which became final and conclusive before May 1, 1922, by making after that date an additional assessment to such first assessment. The Court will not give to a statute any further retrospective operation than is absolutely necessary: *Lauri* v. *Renad* (4); *Smith* v. *Callander* (5); *Sharp Brothers & Knight* v. *Chant* (6); *Rex* v. *Southampton Income Tax Commissioners* (7); *In re Joseph Suche & Co.* (8); *Colonial Sugar Refining Co.* v. *Irving*. (9) The additional assessment is therefore invalid and should be discharged. Assuming that the construction of s. 18 is open to doubt, no tax can be imposed on the subject without

(1) [1914] 1 K. B. 632, 638.
(2) [1913] 3 K. B. 870, 889, 897.
(3) [1915] 3 K. B. 768, 779.
(4) [1892] 3 Ch. 402, 420–1.
(5) [1901] A. C. 297.
(6) [1917] 1 K. B. 771, 775, 778.
(7) [1916] 2 K. B. 249, 257; [1917] 1 K. B. 259, 265–6.
(8) (1875) 1 Ch. D. 48, 50.
(9) [1905] A. C. 369.

words in an Act of Parliament clearly showing an intention to lay a burden upon him: *Coltness Iron Co.* v. *Black.* (1)

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. For many years it was assumed that persons employed by public bodies were assessable under Sch. E. But in *Great Western Ry. Co.* v. *Bater* (2) this House held that such persons were assessable under Sch. D and not under Sch. E. The confusion which was likely to result from that decision by reason of the three years' average led to the passing of s. 18 of the Finance Act, 1922. The object and effect of that section was to confirm retrospectively the existing practice, i.e., to keep those people who had been previously charged under Sch. E still under Sch. E. The taxpayer is treated as a Sch. E person, and that involves that if part of his income for the current year is omitted an additional assessment may be made upon him. The additional assessment having been made after May 1, 1922, it came within the operation of sub-s. 6 of s. 18, and was rightly made.

Konstam K.C. replied.

1927. Feb. 24. VISCOUNT CAVE L.C. My Lords, this is an appeal against an additional assessment to income tax in the sum of 77*l.* made on the appellant on September 13, 1922, in respect of the tax year 1921–2, and raises a question as to the effect of s. 18 of the Finance Act, 1922. The amount in dispute is small; but the case is said to be a test case, the result of which will affect a large number of assessments made in respect of that tax year.

The appellant is an assistant clerk in the employment of the London County Council, and receives a salary and bonus. It had been the practice of the revenue authorities to assess him (with some other persons in the same position) under Sch. E of the Income Tax Act, 1918, as the holder of a "public office or employment of profit." On July 16, 1921, he returned his income for the tax year 1921–2 as 359*l.*; and on December 21, 1921, a notice was given assessing him to tax on that amount in accordance with Sch. E. In fact

(1) (1881) 6 App. Cas. 315, 330. (2) [1922] 2 A. C. 1.

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a revision of his salary and bonus in the month of September had increased his income for the year to 436*l.*; but this was of course unknown to him when he made his return, and was also unknown to the revenue authorities when they made the assessment. There was no appeal against the assessment of 359*l.*, and it became final and conclusive under s. 136, sub-s. 1, of the Income Tax Act in the month of January, 1922.

On March 2, 1922, this House gave judgment in the case of *Great Western Ry. Co.* v. *Bater* (1), and by that judgment (which reversed the decision of the Court of Appeal) held that a clerk in the employment of a railway company did not hold a "public office or employment" within the meaning of the Income Tax Act and accordingly was assessable, not under Sch. E on his actual profits for the year of assessment, but under Sch. D on the average amount of his profits and gains for the three preceding tax years. It has been assumed throughout these proceedings that this decision applied to persons in the position of the appellant; and this assumption has not been contested by the Attorney-General on the present appeal. Upon this footing the appellant ought, as the law stood in December, 1921, to have been assessed, not at 359*l.*, but at 259*l.*, which was the average amount of his remuneration for the three preceding years; but as the time for appeal had gone by, the assessment of 359*l.* could not be, and has not been, disputed by the appellant.

On July 20, 1922, the Royal Assent was given to the Finance Act, 1922, and by s. 18 of that Act (so far as it is material to the present case) it was enacted as follows:—

"18.—(1.) Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under schedule D . . . . shall cease to be chargeable under that Schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act.

* * * * * *

(1) [1922] 2 A. C. 1.

"(3.) Rule 7 of the Rules applicable to Schedule E (which relates to the charge of tax in respect of offices and employments of profit held under a railway company), shall apply to all offices and employments held under, and pensions paid by, a railway company.

"Provided that nothing in this subsection shall affect the provisions relating to the quarterly assessment and the collection of income tax in the case of weekly wage-earners employed by way of manual labour.

* * * * * *

"(6.) The provisions of subsection (1.) and subsection (3.) of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment (other than that of a weekly wage-earner employed by way of manual labour) under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E."

There is no doubt that the appellant, as the holder of an office or employment (though not a public office), falls within the provisions of sub-s. 1 of the above section, so as to be chargeable in respect of the tax year 1922–3 and subsequent years under Sch. E of the Act; nor is there any doubt that his employment comes within the description contained in the concluding words of sub-s. 6 as being held under an employer mentioned in r. 6 of the rules applicable to Sch. E.

On October 13, 1922, the Commissioners of Income Tax gave notice to the appellant of an additional first assessment of 77*l.*, being the amount by which his remuneration had been increased in September, 1921, the notice being headed "Notice of additional assessment under Schedule E in the case of persons undercharged in the first assessment." Against this additional assessment the appellant appealed to the General Commissioners, who decided against him and confirmed the assessment subject to a case stated for the

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opinion of the High Court. The case was argued before Rowlatt J., who discharged the assessment; but on appeal to the Court of Appeal that Court held that full retrospective effect must be given to s. 18 of the Act of 1922, and that the effect of sub-s. 6 of that section was that, in considering the validity of the additional assessment, the original assessment under Sch. E must be deemed to have been in accordance with law; and they accordingly reversed the decision of Rowlatt J. and restored the additional assessment. The appellant has now appealed to this House.

My Lords, with the greatest respect for the opinion of the learned judges of the Court of Appeal, I am unable to agree with their decision. As the law stood in December, 1921, the original assessment then made on the appellant not only was not insufficient, but exceeded by 100*l.* the sum at which he should have been assessed. Now the jurisdiction of the commissioners to make an additional first assessment upon the appellant arose (if at all) under s. 125 of the Income Tax Act, 1918, which provides that such additional assessment may be made if the surveyor discovers that a person chargeable has been "undercharged" in the first assessment; and how the appellant, who was not undercharged but was overcharged to the amount of 100*l.* in the original first assessment, can come within these words, I am unable to discover. It is true that sub-s. 6 of s. 18 of the Act of 1922 provides that for the purpose of "any assessment" made after May 1, 1922, in respect of the profits of an employment there described the provisions of sub-s. 1 shall be deemed always to have had effect; but, even if it be assumed that the expression "any assessment" there used includes an additional first assessment, still the only result of that enactment is to substitute Sch. E for Sch. D so far as that additional assessment is concerned, and not to validate that assessment if it is for other reasons invalid.

The argument for the Crown appears to be that, so soon as the surveyor considers (whether rightly or wrongly) that

he has discovered an undercharge in an assessment made in a previous year and gives notice of an additional assessment in respect of the supposed undercharge, then s. 18, sub-s. 6, requires that the rules under Sch. E shall be applied, not only to the additional assessment, but also incidentally to the earlier assessment to which the additional assessment relates, although that earlier assessment was made and became conclusive before May 1, 1922. It appears to me that this construction gives no effect to the limiting words "for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May 1922"; for if on the mere making of an additional assessment after the date there mentioned sub-s. 1 is to have effect as regards an assessment which was made and became conclusive before that date, then the limiting words might as well have been omitted altogether. Those words appear to me to mean that, while you are to apply Sch. E for the purpose of assessments made after May 1, 1922, and also for the purpose of assessments made before that date which had not then become final and conclusive, you are not to apply it to assessments which were made and became conclusive before that date; and in the present case it is only if Sch. E is applied to the earlier assessment, which was made and became conclusive before May 1, 1922, that the earlier assessment is found to be insufficient. The words "and shall be deemed always to have had effect," upon which so much stress was laid in the Court of Appeal, appear to me to apply quite naturally to an assessment which though made before May 1 had not become final or conclusive on that date; but I do not think that they can, without running counter to the limiting words which appear later in the section, be applied to an assessment which at that date had actually become final and conclusive.

The argument may be put in another (and alternative) way. Let it be assumed in favour of the Crown that for all the purposes of the additional assessment Sch. E must be applied, and that the appellant ought to be and ought always to have been assessed to tax in respect of the sum of 77*l.*

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mentioned in that assessment; even then you have only got half-way. You have still to consider whether on that footing there has been an undercharge in the earlier year, and in so doing you must apply to the assessment of that year the law which obtained when it was made; and if in the present case that course is followed, it will be found that there was in fact no undercharge. The appellant has paid the full tax both in respect of the amount at which he should rightly have been assessed in December, 1921, and in respect of the additional sum since discovered by the surveyor; and while I agree that effect must be given (so far as the context allows) to the retrospective words contained in s. 18, sub-s. 6, of the Act of 1922, I cannot hold that the effect of those words is to make the appellant liable to pay more.

The result is that I find myself in agreement with the conclusion of Rowlatt J. in this case, and I am of opinion that the appeal should be allowed and that the judgment of the Court of Appeal should be discharged and the order of Rowlatt J. restored with costs here and below, and I move your Lordships accordingly.

My noble and learned friend Lord Shaw desires me to say that he concurs in this judgment.

VISCOUNT SUMNER. My Lords, I have already had the opportunity of reading and considering the opinion which my noble friend on the Woolsack has just read; I entirely agree with it and have nothing to add.

LORD ATKINSON. My Lords, I regret very much that I find myself unable to concur in the judgment which has just been delivered by my noble and learned friend on the Woolsack. I take a different view from his. The appellant in this case was at all material times a second class clerk in the employment of the London County Council. His duties were of a clerical character. His remuneration took the shape of a yearly salary with an added bonus. In the year 1921–1922 his salary was 194*l.* 7*s.* 3*d.*, the bonus 241*l.* 19*s.* 2*d.*, making together 436*l.* 6*s.* 5*d.* On October 6,

1921, he was first assessed for income tax for the financial year 1921–1922 in respect of his office on the sum of 359*l.* It is not disputed that this assessment was made under Sch. E attached to the Income Tax Act of 1842; neither is it disputed that, having regard to the decision in the case of *Great Western Ry. Co.* v. *Bater* (1), he was not liable to be assessed under that schedule, inasmuch as the office he held was not of a public nature, and, therefore, that he was properly assessable under Sch. D on the average of the profits and gains received by him in respect of his office during the three years immediately antecedent to the year of assessment. It is not disputed that had this latter method been adopted he would have been assessed only on a sum of 259*l.* 14*s.* 5*d.*, practically 100*l.* less than the sum at which he had been actually assessed. On December 21, 1922, he received notice from the income tax authorities that he had been assessed on the sum of 359*l.*, yet notwithstanding the aforesaid facts, he never objected to this latter assessment, never appealed against it, or otherwise questioned it, but paid the amount of the income tax found to be due by him on the assumption that the higher of the two possible assessments was the proper and valid one, and in para. 3 of his case it is stated that he does not now seek to disturb this assessment of 359*l.*

The 99th section of the Income Act of 1918 requires that the assessors shall within the time directed by the precept of the General Commissioners give a particular notice to every person chargeable within the limits shown in the Act, requiring him within such time as shall be limited, to prepare and deliver to the assessors all such lists, declarations and statements as are required by this Act to be delivered. The 100th section provides that every person chargeable under this Act, where required to do so by any general or particular notice given in pursuance of the Act, shall within the period limited by such notice prepare and deliver to the assessor a true and correct statement in writing, as required by the Act, signed by him containing amongst other things the amount of the rofits and gains arising or accruing to him from

(1) [1922] 2 A. C. 1.

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each and every source chargeable according to the respective schedule, estimated for the period, and according to the provisions and rules of the Act. By sub-s. 4, it is provided that every person upon whom such a particular notice has been served by an assessor requiring him to deliver a statement of any profits or gains or income in respect of which he is chargeable under Schedules D or E, shall deliver a statement in the form required by the notice whether or not he is so chargeable. A penalty can be inflicted for the omission to comply with this notice.

In the case stated it is set forth that the first assessment was made on the appellant on October 6, 1921, and that notice thereof was given to him on December 21, 1921. The first matter to be considered is the force and effect of an assessment.

In the oft cited case of *Allen* v. *Sharp* (1) Parke B. uses these words: "An assessment not appealed from stands precisely in the same situation as one confirmed after appeal." That statement has been quoted, apparently with approval, by Avory J. in *Rex* v. *Bloomsbury Income Tax Commissioners.* (2)

The subject of assessment, its methods and consequences, are dealt with fully in Part VI. of the Income Tax Act of 1918. I have already referred to the section which imposes upon a person in the receipt of an income the statutory duty of making a return of that income. The 107th and some of the following sections of this statute prescribe the action to be taken if the taxpayer neglects to discharge this duty. The first-named of these sections enacts: "A person who neglects or refuses to deliver, within the time limited in any general or particular notice, or wilfully makes delay in delivering a true and correct list, declaration, or statement, which he is required under this Act to deliver shall—(*a*) if proceeded against before the general commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act, and such penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the

(1) (1848) 2 Ex. 352, 366. (2) [1915] 3 K. B. 768, 790.

assessment; or (*b*) if proceeded against by action or information in any court forfeit a sum of [fifty pounds"]. Then comes in sub-s. 2 the following important provision: "The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid." By s. 112 it is enacted: "If the assessor do not receive a statement from a person liable to be charged to tax he shall to the best of his information and judgment—(*a*) make an assessment upon that person of the amount at which he ought to be charged under Schedules A, B and E"; and (*b*) "estimate the amount at which that person ought to be charged under Schedule D and make a return to the commissioners of the name and address of that person and of any other particulars which the commissioners may require." The following section (113) requires that every assessor shall deliver to the commissioners on or before the day appointed by them his certificates of assessments under Schedules A, B and E, and all statements and lists which have been received by him before the appointed day. Subsequent provisions prescribe the use the commissioners may make of these documents. I have referred to these provisions and the machinery set up by them to show that the first assessment made against the appellant is a formal and valid thing; that it cannot now be set aside or even qualified, although it was in fact based on a wrong schedule. Nor can the additional assessment be, in my view, dealt with as if its validity depended on the result, as it were, of an account to be taken between the appellant and the Income Tax Department, and the additional assessment be held invalid because the appellant was overcharged 100*l.* on the first assessment.

Sect. 125 of the Act of 1918 deals with additional assessments. The first of its provisions applies to the present case. It provides that if the surveyor discovers that any proportion of profits chargeable to tax have been omitted from the assessment, or that a person has not delivered any statement, or has been undercharged in the first assessment, he may make an additional assessment. The appellant's case comes within the second provision. He has not delivered any

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statement, and he was undercharged on the first assessment, even if it was rightly based on Sch. E. Under that Sch. E he ought to have been assessed on an income of 436*l.* 6*s.* 5*d.* instead of on an income of 359*l.* It was not appealed against. The fact that some of the income of the taxpayer was omitted from it would not make it invalid. If it be taken as valid and binding, as on its face it must, in my view, be taken to be, then the appellant was undercharged to the amount of 77*l.*

Your Lordships were referred to several authorities laying down the principle upon which the question should be determined whether a statute acts retrospectively or not. Amongst those authorities the case of *Smith* v. *Callander* (1) and Lindley L.J.'s judgment in *Lauri* v. *Renad* (2) were included. The rule which according to those authorities is to be applied is thus stated in Maxwell on Statutes, p. 382. "It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication." If a clause in a statute says in so many plain words that the statute shall have retrospective operation, then it must not be construed so as to defeat those express words. Now in the present case it is not disputed that the first assessment was made on October 6, 1921, that notice of it was duly given to the appellant on December 21, 1921, that he did not appeal against or question it in any way and that it consequently became valid and binding. On September 13, 1922, after May 1, 1922, the additional assessment, the subject of this appeal, was made. The words of sub-s. 6 of s. 18 of the Finance Act, 1922, enact as plainly as words can that sub-ss. 1 and 3 of s. 18 shall have retrospective operation. The words run thus: "The provisions of sub-section (1.) and sub-section (3.) of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May, nineteen hundred

(1) [1901] A. C. 297. (2) [1892] 2 Ch. 402, 421.

and twenty-two." I do not know what more direct and conclusive language could be used to make those provisions of this statute (to which the Royal Assent was given on July 13, 1922) retrospective in their operation for the purpose indicated. I confess I am utterly unable to construe those words so as to put the additional assessment outside their real application. I think that they clearly and directly apply to it and I am consequently of opinion that the appeal fails. If this construction of this statute enables the income tax authorities to bring up stale demands against a taxpayer under the form of additional assessments, that evil should be corrected by legislation, not by a faulty construction of a retrospective clause in an existing statute.

LORD CARSON. My Lords, I think that this appeal should be allowed for the reasons stated by the noble and learned Viscount on the Woolsack, and I have nothing to add.

Order of the Court of Appeal discharged, and order of Rowlatt J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 24, 1927.

Solicitors for appellant: *Stanley & Co.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 Dec. 15.

VINCENT . . . . . APPELLANT;

AND

SOUTHERN RAILWAY COMPANY . . RESPONDENTS.

Railway Company—Breach of statutory Duty—Prevention of Accidents Rules, 1902, *r.* 9 [*St. R. & O.*, 1902, *No.* 616]—*Action under Lord Campbell's Act—Railway Employment* (*Prevention of Accidents*) *Act*, 1900 (63 *&* 64 *Vict. c.* 27), *s.* 1, *sub-s.* 1.

By r. 9 of the Prevention of Accidents Rules, 1902: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall . . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose, shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

The foreman of a gang in the employ of a railway company was employed to repair some signalling apparatus on the permanent way, and took with him a member of his gang to assist him. Whilst engaged in working on the down main line he with his fellow workman stepped off the line on to the up line to avoid a down train and both men were killed by an up train.

In an action by the widow of the foreman under Lord Campbell's Act for damages against the railway company for breach of statutory duty, the judge directed the jury that a regulation of the company under which the foreman of a gang was entrusted with the duty of seeing that a look-out man was provided whenever he or any of his gang were at work upon the line was a compliance with r. 9. The jury found that the company had not omitted to perform their statutory duty of providing a look-out man, and that the foreman's death was caused by the negligence of one or the other or both of the men, and judgment was entered for the company. A motion for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence was refused by the Court of Appeal.

Order of the Court of Appeal affirmed.

Per Curiam: The rule does not require the look-out man provided to be some one who is not a member of the gang itself, but is appointed additionally.

Per Viscount Cave L.C. (with the concurrence of Lord Atkinson and Lord Shaw of Dunfermline): *Semble*, the duty of the railway company

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* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

under the rule in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act. The company does not comply with the rule by merely making regulations under which the foreman of a gang is entrusted with the duty of appointing a look-out man; and, if the foreman fails in that duty, the company may be made liable for injury happening to a member of the gang other than the foreman himself.

Lord Sumner reserved his opinion on the question whether the railway company was liable under the rule, not only to provide a person available for designation as the look-out, but, if the look-out man was not posted, was also liable in a question with a workman other than the foreman, or, if the look-out man was posted but failed to be diligent, was liable in a question with a person other than the look-out man himself.

Lord Carson also reserved his opinion as to the effect of negligence on the part of the look-out man, however appointed.

APPEAL from an order of the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) refusing to set aside a verdict and judgment in favour of the respondents (the defendants) in an action tried before Avory J. and a special jury.

The following statement is taken from the opinion of the Lord Chancellor :—

The main facts giving rise to this action are not in dispute. On November 13, 1923, Edward James Vincent, a signal ganger in the employ of the respondent company stationed at Ashford, went, by the instructions of Mr. Stapeley, the signal inspector in charge of the Ashford district, to a place on the respondents' line near the Gas House Lane signal box for the purpose of repairing a detector rod. At the place in question there are three lines of railway —namely, a slow down line (which was the northernmost of the three lines), a main down line (in the centre) and an up line (on the southern side); and the detector rod, which is a contrivance for preventing the signals from acting when the points are not fully closed, was fitted to the up line. Vincent, who was an experienced and careful man, was allowed by the inspector to decide for himself what assistance he required; and he took with him a fitter's mate named Stockwell, who was a member of his gang. The two men left Ashford Station at about 1.20 P.M. and reached the place in question at about 1.40; and at a few minutes before

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2 o'clock the adjustment of the detector rod (which was a small matter) appears to have been completed, and the men went to the signal box. At 2.5 P.M. they left the signal box, and the signalman did not again see them alive. At 2.18 three trains passed the spot—namely, a train on each of the two down lines running towards Ashford Station, and a third train on the up line—namely, the express train from Dover running from the direction of Ashford towards London. Just before the up train reached the place where the men had been at work, a platelayer named Gilbert, who was working a little way off in the Ashford direction, saw Vincent and Stockwell going from the main down line towards the up line—to use Gilbert's words, "just leisurely walking across"—and formed the impression that the boat train must strike them. On going to the spot after the trains had passed Gilbert found both Vincent and Stockwell lying by the up line, dead, and it became clear that they had been struck and killed by the up train. There was evidence that immediately before the accident they, or one of them, had been at work, not on the detector rod on the up line, but on a locking bar (or clearance bar) which was fixed to the main down line in the neighbourhood of the detector rod; for Gilbert says that when he first saw them it appeared to him that they were working on the locking bar, and after the accident it was found that some nuts had been removed from that bar and tools were lying near it.

From these facts, which were substantially the only facts proved in direct relation to the accident, it would appear to be reasonably clear that just before the accident the two unfortunate men, or one of them, had been engaged in repairing the locking bar on the down line; that they saw the down train approaching, and stepped aside for safety; and that, not seeing the up train—probably because neither of them looked that way and the noise of the other two trains prevented them from hearing its approach—they went in a leisurely way on to the up line and so met their death.

The widow and dependant children of Vincent were no doubt entitled to compensation under the Workmen's

Compensation Act; but the widow preferred to bring this action against the company under Lord Campbell's Act, alleging that the company had been guilty of negligence and of a breach of their statutory duty, which resulted in her husband's death, and claiming damages for herself and her children.

The statutory duty referred to is that imposed by r. 9 of the Prevention of Accidents Rules, 1902, made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900. The Act provides by s. 1, sub-s. 1, as follows: "The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the Schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service."

The subject-matters set out in the Schedule included: "No. 12. Protection to permanent way men when relaying or repairing permanent way."

Rule 9 of the Rules of 1902 is in the following terms: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

Rule 273 of the Rules and Regulations issued by the respondent company contains the provisions following:

"When men are working singly or in gangs on or near lines in use for traffic, the foreman, ganger, or other man in charge of the gang for the time being must, in all cases where any danger is likely to arise, appoint one or more persons as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching, and

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he must satisfy himself that the look-out man appointed is properly equipped, is stationed in a suitable position, and is wearing a distinctive badge.

"No man is to be appointed as look-out man unless he has previously been passed by the Engineer's Department as competent to act in that capacity."

This regulation was in existence before the passing of the Act of 1900, but was continued in operation after the passing of that Act and the making of the statutory rules; and it had been brought specifically to the notice of Vincent and Stockwell, both of whom were qualified to act as look-out men.

The allegations in the statement of claim were that the work in which the two deceased men were engaged was work in which danger of injury by passing trains was likely to arise, and that the defendants were wanting in care and were guilty of a breach of their statutory duty in causing and allowing the work to be performed without providing persons or apparatus for the purpose of maintaining a good look-out, or for giving warning against the approach of any train during the performance of the work, and that it was in consequence of this negligence and breach of duty that the death of Vincent occurred. These allegations were denied. The action was tried by Avory J. and a jury, and at the conclusion of the case the learned judge left seven questions to the jury, these questions and the replies given by the jury being as follows:—

"1. Was Vincent at the time in question working on the permanent way for the purpose of repairing the same? Yes.

"2. Was Vincent responsible for deciding whether this was a one-man job and was he responsible for a look-out man being in attendance? Yes.

"3. Was the man Stockwell in the circumstances provided as a look-out man? Yes.

"4. Did the defendant company in the circumstances of this case omit to perform their statutory duty of providing a person for the purpose of maintaining a good look-out? No.

"5. Did such omission cause the death of Vincent? The answer to Number 4 answers this question.

"6. Were the defendants guilty of negligence in the performance of their common law duty to take reasonable care for the safety of their workmen? No.

"7. Was the death of Vincent caused by his own negligence or the negligence of his fellow workman (Stockwell)? One or other or both."

On these findings judgment was given for the defendants. An application to the Court of Appeal for a new trial on the ground of misdirection and that the verdict was against the weight of evidence, failed, and the plaintiff has now appealed to this House.

1926. Nov. 23. *Mitchell Banks K.C.* and *Shakespeare* (with them *Montague Berryman*) for the appellant. The respondents did not comply with r. 9 of the Prevention of Accidents Rules, 1902, by imposing upon Vincent, who was one of the persons intended to be protected by the rule, the duty of himself appointing a look-out man. The rule imposed upon the respondents the duty of providing a look-out man expressly instructed to act as such for the purpose of protecting Vincent, and in fact no such look-out man was provided as required by the respondents. The learned judge was wrong in directing the jury that the respondents satisfied the obligations imposed by r. 9 by making regulations which imposed upon the ganger or other man in charge the duty of complying with the provisions of the rule. The second, third, fourth and fifth findings of the jury depended on the erroneous interpretation placed by the judge upon the rule. The seventh finding that the death of Vincent was caused either by his own negligence or by the negligence of his fellow workman or of both, was against the weight of evidence.

[They referred to *Ferguson* v. *North British Ry. Co.* (1); *David* v. *Britannic Merthyr Coal Co.* (2); *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (3)]

Schiller K.C. and *Malcolm Hilbery* for the respondents were not called on.

(1) 1915 S. C. 566.
(2) [1909] 2 K. B. 146, 156; [1910] A. C. 74.
(3) [1912] A. C. 693.

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The House took time for consideration.

1926. Dec. 15. VISCOUNT CAVE L.C. [after stating the facts :] My Lords, the principal objection taken by the appellant to the summing up of the learned trial judge related to the direction given by him to the jury as to the effect of r. 9 above quoted, and especially to the following passage in the summing up : " The reasonable construction obviously must be put upon it, and, in my view, it is a reasonable construction to put upon that rule, and a reasonable compliance with it, if the company make regulations which the men themselves are expected to observe, and under those regulations a man like Vincent, that is, the foreman of a gang, or the ganger as he is called, is entrusted with the duty of seeing that a look-out man is provided whenever he or any of his gang are at work upon the line. That is why I have called your attention to what appears to me to be the importance of this Rule 273, that rule being still in force and it being under that rule the duty of Vincent to provide a look-out man. If this was a job which he could do by himself, then you may reasonably and properly come to the conclusion that Stockwell was, in the circumstances, provided as a look-out man."

It is said that on the true construction of r. 9 it is necessary that on every occasion when a gang of men is sent to repair the permanent way an agent of the company not being a member of the gang should decide whether in the course of the work danger is likely to arise, and in that event should provide a look-out man and instruct him to act, and that in this case the company, having delegated those duties to the ganger in charge of the gang, had not complied with the rule.

My Lords, I am disposed to agree with the view, which was expressed by Atkin L.J. in his judgment on the appeal, that it is a mistaken view of the rule to say that the company have complied with it by merely making regulations under which a foreman is entrusted with the duty of seeing that there is a look-out man, and that the company have not

performed their duty unless in pursuance of that delegated task the foreman does in fact provide and appoint a look-out man. The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but nevertheless if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it.

But assuming this to be the effect of the rule, there are in the present case two considerations which appear to me to be fatal to the appellant's claim.

In the first place there is, in my opinion, no evidence on which the jury could have found that Vincent failed to appoint a look-out in accordance with the company's regulation. The jury have found that Stockwell was provided as a look-out man, which involves a finding that the work on which Vincent was engaged was a one-man job and left Stockwell free for that purpose; and in my opinion there was ample evidence on which they could so find. Further the whole of the evidence appears to me to be consistent with the view that Vincent when he went to work on the locking bar instructed Stockwell to keep a look-out, and that Stockwell in fact did so and warned Vincent of the approaching down train; but that both the men, when they left the down line in order to allow the fast down train to pass, failed to observe the approach of the up express and,

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instead of remaining in the six foot way, stepped on to the up line. If so, the right conclusion appears to be that at which the jury arrived—namely, that the accident was due, not to any negligence or breach of duty on the part of the company, but to the carelessness of the two unfortunate men, and there is no ground for directing a new trial.

But, secondly, if it were otherwise, and if it were found that Vincent had failed to instruct Stockwell to keep a look-out, the plaintiff would still be in the difficulty pointed out by the Court of Appeal. In that case Vincent would have been in default for not complying with the company's regulation which bound him to appoint a proper look-out, and his representative could not recover for the consequences of his own default.

On both grounds it appears to me that on the issue of breach of statutory duty the appellant is out of court; and as no other negligence is now alleged, the action was rightly dismissed, and the appeal must fail. Accordingly I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the judgment just delivered from the Woolsack by my noble and learned friend and with every part of that judgment.

LORD SUMNER. My Lords, the appellant asks for a new trial on two grounds: (1.) that the learned judge's summing up misconstrued r. 9 of the Prevention of Accidents Rules, 1902, and (2.) that the jury's answer to the seventh question —namely, that Vincent's death was caused by the negligence of himself or of Stockwell or both—was against the weight of the evidence.

The rule may be analysed thus. First it states the object in view and then it imposes on the railway company the duty of "providing" look-out men in certain circumstances, who are to have suitable appliances and instructions for the purpose. As an alternative to look-out men, "apparatus" for maintaining a good look-out may be provided. The

object is that of protecting men at work. The provision is to be made "in all cases where any danger is likely to arise"; and the persons are to be provided "for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working"; and the persons employed for such purpose "shall be expressly instructed to act for such purpose and shall be provided with all appliances necessary to give effect to such look-out."

My Lords, what the railway company did was to make and maintain a railway rule, pursuant to which the foreman of a gang was required to appoint a member of the gang expressly to perform this duty "in all cases where any danger is likely to arise" and "to satisfy himself that the man is properly equipped and stationed in a suitable position."

In the present case the look-out man provided, if any, was either Vincent himself or Stockwell, according as Vincent, the ganger, might have appointed. It was to this that questions were directed by the learned judge asking the jury to say whether the job in hand at the time was a "one-man job" or a "two-man job." Their answer was that it was a "one-man job." There was evidence to raise the question, and their answer establishes that the company had provided the necessary person, if the learned judge rightly construed r. 9 as authorizing a "provision," which consisted in detailing enough men for the gang to enable the foreman to select one of them as look-out, whenever he thought danger was likely to arise. Nothing turns on the equipment, for in the circumstances it would not have been necessary to use it. The evidence showed that the company had provided it, but did not show that it was actually in use or even had been taken to the spot by the men.

It is clear that, if Vincent, who knew the rule, had obeyed it and if the look-out man had been vigilant, both men would have been safe. Both knew and had been examined in look-out duties, and both were experienced permanent-way men. The appellant, however, argues that r. 9 is not satisfied by providing men enough to enable a look-out man to be detailed

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from among them and leaving it to the foreman to set the look-out as part of his regular duty, because, truly construed, it requires the look-out provided to be some one, who is not a member of the gang itself, but is appointed additionally and gets his orders independently of the foreman.

My Lords, I do not think that this meaning can be got out of the words. "Persons" are to be provided, which is a most general term. Nothing shows that workmen and watchmen are mutually exclusive classes, though, of course, a workman who is employed to keep a look-out, cannot, while doing so, at the same time work on repairs. Such "persons" are to be expressly "instructed," but there is nothing to show when or by whom. Standing orders properly brought to their knowledge and prior teaching properly impressed on them will satisfy the term. Apparatus is an alternative provision, and there is nothing to show that it may not be such as the gang themselves would have to place in position or set in operation. The initial words, expressing the object of the rule, are further invoked, and it is said that protection to the men implies protection ab extra; that protection, in fine, is something different to self-protection. Apart from the point that words which state the object of a rule cannot control the clear mandatory words of the rule itself, I would observe (1.) that a rule made by the company may well supply all that these prefatory words require, when it both orders the men to take specified precautions and removes in respect of one member of the gang any duty to join in the repairs which are in hand. This may well supply that external pressure and aid, which will make the instinct of self-preservation efficacious and protect the members of the gang, where their own instincts fail them. Further (2.) the words "in all cases" (i.e., of relaying or repairing the permanent way in use for traffic) "when any danger is likely 'to arise'" (i.e., from that traffic) are essentially relative to the condition of the permanent way and of that traffic from time to time, and, unless the rule requires the provision of a look-out man not from time to time but throughout the day, which it neither says nor implies, the

only person who can judge such danger is the man who is on the spot, authorized to detail and instruct the look-out man, and that person is almost inevitably the foreman of the gang. True, the words are "in all cases where" not "whenever," but also the words are in all "cases" not in all "places." I think "case" includes the place, the time, and the method of carrying out the repair, and it is not a breach of the rule on the company's part to delegate to the foreman (as an incorporated company must delegate to some one) the duty of posting a look-out man ad hoc, who has been previously instructed, equipped and provided for the purpose. I conclude, therefore, that the misdirection alleged is not made out.

Equally do I think that the appellant fails to show that the answer impugned was against the weight of the evidence. The plaintiff had to show not only a breach of the rule, but a breach causing her husband's death. In the circumstances a look-out man, if posted, could not have failed to give adequate warning unless he was neglecting his duty. If Vincent acted as look-out, he was killed because he failed to observe the up boat train in time and to act accordingly. If he failed to post any look-out, either Stockwell or himself, he was killed because there was no look-out at all. If he posted Stockwell and was not warned by him in time, his widow could only recover, if under the rule the company is liable not merely for not providing a person to act as look-out, but also for the negligence of that person, if, being so posted, he fails to look out properly. As to the first two possibilities, I agree with the Court of Appeal, that the plaintiff was in a dilemma. If Vincent failed to post a look-out or, being the look-out himself, failed to be duly vigilant, he contributed to his own death. As to the third possibility, there is no evidence whatever that Stockwell was made the look-out, and the evidence as it stands negatives it. Work on the detector rod was finished. There is some slight evidence that something was being done to the locking bar on the down main line. Quitting that bar, while the down train passed on the line, did not oblige the men to cross the

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up main line. The regulations provide for their remaining in the six foot. The only man who saw them, Gilbert, speaks of seeing them walking leisurely on the up main line just before they were run down, as if they had miscalculated their distance. If so, no one was then keeping any look-out; both men were together, and knew there was no look-out, and they were crossing a line in use, when they might safely have stayed in the six foot. This evidence, which is all we have, implicates Vincent in contributory negligence, and the verdict of the jury was not against the weight of the evidence. I, therefore, express no opinion on the question whether the company is liable under the rule not only to provide a person available for designation as the look-out, but, if a look-out is not posted, is also liable in a question with a workman other than the foreman, or, if the look-out man is posted but fails to be diligent, is liable in a question with a person other than the look-out man himself.

I think the appeal should be dismissed.

LORD CARSON. My Lords, I agree. I should like, however, to reserve any opinion as to the effect of negligence upon the part of the look-out man, however appointed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 15, 1926.

Solicitors for the appellant: *Pattinson & Brewer.*

Solicitor for the respondents: *W. Bishop.*

[HOUSE OF LORDS.]

CLARE AND HEYWORTH AND OTHERS . APPELLANTS ; AND BETTS . . . . . RESPONDENT.

H. L. (E.)* 1927 April 4.

Revenue—Income Tax—Trade Profits—Trade set up within three Years preceding Year of Assessment — Average of Profits — Computation — Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and II., r.* 1, *sub-r.* 2 ; *r.* 9.

On March 1, 1919, a firm set up a new trade. On December 31, 1919, they made up the first account of the trade for the ten months from March 1, 1919, to December 31, 1919, that account showing a profit for that period of 1000*l.* The firm sold the trade as from January 1, 1920, to a company consisting of the same persons. The company made up an account of the profits of their trade for the three months from January 1, 1920, to March 31, 1920, showing a profit for those three months of over 12,000*l.* For the year ending April 5, 1919, the assessment to income tax under the Income Tax Act, 1918, Sch. D, was made on the firm in a sum equal to a proportionate part (from March 1 to April 5) of the profits shown by the account to December, 1919, and it was agreed that that was correct. For the year ending April 5, 1920, assessments were made on the firm and the company on a sum representing twelve-thirteenths of the profits shown by combining the two accounts for the respective periods of ten months and three months, that sum being apportioned between the firm and the company according to their respective liabilities. The firm and the company appealed against the assessments on the ground that they ought to have been made on a sum representing twelve-tenths of the sum shown in the account for the ten months from March 1 to December 31, 1919, and the Commissioners acceded to this argument :—

Held, that upon the true construction of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., except in the case of a trade set up within the year of assessment, the profits should be computed without bringing in any profits of the year of assessment.

Burntisland Shipbuilding Co. v. *Weldhen* 1923 S. C. 449 ; 8 Tax Cas. 409 followed.

Decision of the Court of Appeal [1926] 2 K. B. 289 reversed and decision of Rowlatt J. [1925] 2 K. B. 402 restored.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. (2), which affirmed a decision of the

* *Present :* VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, LORD CARSON, and LORD BLANESBURGH.

(1) [1926] 2 K. B. 289. (2) [1925] 2 K. B. 402.

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CLARE AND HEYWORTH v. BETTS.

Commissioners for the Special Purposes of the Income Tax Acts.

The trade of the appellants, which was that of textile manufacturers, was set up on March 1, 1919. The first accounts of the trade were made up for a period of ten months, beginning on March 1, 1919, and ending on December 31, 1919, and they disclosed a profit of 1000*l.*

For the first year of charge of the trade—namely, the income tax year, April 6, 1918, to April 5, 1919—the profits were taken to be 117*l.*, and an assessment for that year was made accordingly. The figure of 117*l.* was arrived at by taking a due proportion of the above mentioned profit of 1000*l.* for the thirty-six days during which the trade had been carried on in that year. No question arose on the appeal with regard to the assessment for 1918–19, and it had not been disputed by the appellants. A second set of accounts of the trade had been made up for the three months beginning on January 1, 1920, and, the period being one of great prosperity, the profits shown by the accounts amounted to 12,150*l.*

The date, December 31, 1919, up to which the first accounts were taken and which resulted in the above mentioned period of ten months, was adopted for purposes of excess profits duty and in view of the expected termination of that impost. The date, March 31, 1920, up to which the second accounts were taken, resulting in the above mentioned period of three months, was adopted because it had been decided that for the future the financial year of the business should terminate on that date.

Assessments were made for the income tax year 1919–20 (being the second year of the trade) in respect of the profits of the trade. The method employed in making those assessments was to combine the profits for the thirteen months, March 1, 1919, to March 31, 1920—namely, 13,150*l.* —and to assess twelve-thirteenths of that total, with the result that 12,138*l.* was charged to tax for that year.

It was contended for the appellants that upon the true construction of r. 1, sub-r. 2, of the Rules applicable to

Cases I. and II. of Sch. D (1), the proper figure at which the profits should be taken for the year 1919–20 was 1200*l.*, being twelve-tenths of the amount of 1000*l.* shown in the above mentioned accounts for the ten months from March 1, 1919, to December 31, 1919, and that the accounts for the later period of three months from January 1, 1920, to March 31, 1920, showing a figure of profits of 12,150*l.*, should be disregarded.

It was contended on behalf of the inspector of taxes that under the Rule in question both the said accounts should be taken into consideration for the purpose of arriving at the figure of profits for the year of charge 1919–20, and that in effect the figures of the two accounts for the respective periods of ten and three months ought to be combined, so as to produce a figure of 13,150*l.* for the thirteen months March 1, 1919, to March 31, 1920, and that twelve-thirteenths of that figure—namely, 12,138*l.*—ought to be taken as the profits for the year of charge April 6, 1919, to April 5, 1920.

In the course of the year of charge the ownership of the trade had changed, the business which previously had been carried on by a partnership firm trading as Clare & Heyworth being transferred on March 1, 1920, as from January 1, 1920, to Clare & Heyworth, Ld., but it was conceded that that change of ownership of the trade did not affect the question raised in the appeal with regard to the amount at which the profits of the trade for the year of charge were to be taken.

The Commissioners decided that the appellants' liability should be based on the accounts to December 31, 1919, without regard to the accounts to March 31, 1920, and they reduced the assessments to 1200*l.*

Rowlatt J. affirmed the decision of the Commissioners

(1) Rules applicable to Cases I. and II. of Sch. D, r. 1, sub-r. 2: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

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on the ground that the terminus ad quem of the period over which the average was to be calculated in the case of such recently established businesses was the beginning of the year of charge, and that the facts antecedent to the year of charge were alone to be looked at. His decision was reversed by the Court of Appeal by a majority (Lord Hanworth M.R. and Sargant L.J.; Scrutton L.J. dissenting).

1927. Feb. 17, 18, 21. *Sir John Simon K.C.* (with him *Cyril King*) for the appellants. Under the Rule applicable to Case I. of Sch. D, in taxing trade profits the profits are to be determined on an average of the three years immediately preceding the year of assessment. Then by sub-r. 2 of r. 1 of the Rules applicable to Cases I. and II., provision is made for the case where a trade is set up within the period of three years. There the terminus a quo is altered, but nothing is said about the terminus ad quem. The fair inference is that the terminus ad quem remains. The general principle is that profits arising in the year of assessment are not to be taken into account for the purpose of arriving at the average. The only exception is where a trade is set up within the year of assessment. In that case the profits of the year of assessment are made both the subject and measure of the liability to tax. The correct method of computation in this case is to take the figure of profit for the period antecedent to the year of assessment 1919–20, and to expand that figure to terms of a complete year. The accounts to December 31, 1919, were the only evidence of what the profit for that period was. The fact that these accounts encroach upon the year of assessment does not prevent the application of the method of computation contended for by the appellants. *Burntisland Shipbuilding Co.* v. *Weldhen* (1) is precisely in point. Lord Cullen there states the appellant's contention in a sentence. *S.S. Glensloy Co.* v. *Lethem* (2), in which Lord Johnston dissented, depended upon its special circumstances, but so far as it depends on

(1) 1923 S. C. 449; 8 Tax Cas. 409, 416.
(2) 1914 S. C. 549; 6 Tax Cas. 453.

any general principle it is inconsistent with the *Burntisland* case. (1)

[He also referred to *Yuanmi Gold Mines* v. *Eborall.* (2)]

Reginald Hills (*Sir Douglas Hogg A.-G.* with him) for the respondent. There is no general principle that the yearly average is to be ascertained only in years preceding the year of charge. Different methods are adopted for different classes of property according to what will best work justice. Sub-r. 2 of r. 1 says that the computation shall be made on the average profits or gains for one year from the period of the first setting up of the same. It says nothing about excluding the year of charge, and there is no justification for reading in those words. The omission of any such limitation coupled with the reference to Case VI. in the later part of the sub-rule impliedly authorizes having recourse to the year of charge. Therefore the whole period of thirteen months from the first setting up of the trade down to the end of the last account made up for the trading of the year of charge ought to be taken into account as the basis upon which the average of profits for the year of charge is to be calculated.

The House took time for consideration.

1927. April 4. VISCOUNT SUMNER. My Lords, this appeal raises the question how the Income Tax Act, 1918, computes taxable profits, where a trade has been first set up a few weeks before the commencement of the year of charge. The Crown affirms and the subject denies that, in such a case, the Inland Revenue is at liberty to bring into the computation the profits of so much of the year of charge itself as will make up a complete twelvemonth and even, if circumstances require it, the profits of the whole of the year of charge. The subject contends that, except in the case of a trade set up within the year of assessment, the profits must be computed without bringing in any profits of the year of charge at all.

The appellants, Clare & Heyworth, started a trade, and then sold it to Clare & Heyworth, Ld. Both are joined in

(1) 1923 S. C. 449 ; 8 Tax Cas. 409, 416. (2) [1921] 2 K. B. 544, 566.

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this appeal, because the firm was assessed in respect of one year and the company in respect of the next, but nothing now turns on the distinction between them, for the partners in the firm hold the shares in the company. It is also admitted by the appellants that the business is for assessment purposes one continuous business.

The dates are as follows. The firm began business on March 1, 1919. The company was incorporated on February 16, 1920, and on March 1, 1920, it adopted the agreement for the purchase of the firm's business. Since then the company has carried on the business begun by the firm.

In 1922 and 1923 assessments were made on the firm and on the company for the year April 6, 1919, to April 5, 1920. The practical importance of the dispute turns on the liability to tax in respect of a sharp increase of profit made in the three months from January 1 to March 31, 1920. When the assessment for the year 1919–1920 came to be made, the question arose whether this profit could be included in the computation of the tax for that year under Sch. D.

The respondent firm was assessed for the year 1918–19 in respect of the period March 1, 1919, to April 5, 1919, in the sum of 117*l.* This was ascertained as follows. The firm made up a balance sheet to December 31, 1919, for the ten months from March 1, 1919, which showed 1000*l.* profit. The sum of 117*l.* was computed as the proportional part of this profit for the period from March 1 to April 5, 1919. The date, December 31, 1919, was selected for the purposes of excess profits duty. This has not been adopted by the company as the date at which to make up its annual balance sheets. The date selected in subsequent years has been March 31.

For the year 1919–1920 the appellants (who have to apportion between themselves whatever tax may be payable) have contended that the assessment on the company ought to be on the profits actually made between March 1, 1919, and April 5, 1919, expanded to an entire twelvemonth by a process of "averaging," thus representing for income tax

purposes the profits of the following year of charge. The Inland Revenue contends that the statutory mode of computation allows the profits actually made after April 5, 1919, during the year of charge to be brought in, thus including the three months of exceptional prosperity in 1920. Whether the part of the year of charge thus to be included is only such part as would make up a complete twelve months, when added to the period from March 1 to April 5, 1919, or may be extended to the whole of the year of charge in a similar case, constituted an alternative question.

The Commissioners adopted the subjects' contention, and their conclusion was affirmed by Rowlatt J. His decision was reversed in the Court of Appeal, Scrutton L.J. dissenting. The only authorities on the point were both decided in the Court of Session—namely, *S.S. Glensloy Co.* v. *Lethem* (1); and *Burntisland Shipbuilding Co.* v. *Weldhen.* (2)

It is to the actual wording of the relevant cases and rules under Sch. D that one must first turn, and these are the Rule applicable to Case I. and Rule 1, sub-r. 2, of those applicable to Cases I. and II. These must be read together, the latter being in the nature of a proviso on the former, and for this purpose the Rule applicable only to Case II., which comes between them in the Act, may be ignored. With great respect to Sargant L.J. I am unable to adopt the principle on which his judgment is so largely founded—namely, that these Rules should be treated as entirely independent enactments.

By the Rule applicable to Case I. the tax (that is the tax under Sch. D charged under Case I. " in respect of any trade not contained in any other Schedule ") " shall be computed on the full amount of the . . . . profits upon a fair and just average of three years " ending in this case, where the accounts of the trade had not been usually made up to any date, on April 5, 1919. As, however, there were not three years of trading before that date, it becomes necessary to proceed to the words of Rule 1, sub-r. 2, of the Rules applicable to Cases I. and II.—namely, " where the trade has been

(1) 1914 S. C. 549. (2) 1923 S. C. 449.

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set up . . . . within the said period of three years " (i.e., before the eve of the year of charge) " the computation shall be made on the average of the profits . . . . for one year from the period of the first setting up of the same."

If these words mean " on the average of the profits for one year from the first setting up " if and when the date of the setting up was as much as one year from the commencement of the year of charge, then they do not apply to this case. If so, however, the rule itself does not apply to this case at all, for the following words only relegate the computation of the profits to another case—namely, Case VI.—where the trade has been set up within the year of assessment, and thus no rule deals with the case of a trade set up within three years of the beginning of the year of charge, but not so much as a complete year before it.

On such a construction what at first sight appears to have been a complete formula for computing tax in all the possible cases, dividing them into the cases where the trade has been, and the cases where it has not been, set up before the commencement of the year of charge, contains an obvious gap, within which the present case falls and remains unprovided for. Does the formula really leave such a gap, or does it, truly construed, cover this case as well as the other ?

My Lords, the words in Rule 1, sub-r. 2, of the Rules applicable to Cases I. and II.—" within the said period of three years " —refer to the Rule applicable to Case I. and virtually incorporate them as follows : " three years ending on . . . . the fifth day of April preceding the year of assessment." If these words be written into the later rule, clearly the present case falls within them in point of time. The question then is whether or not it is nevertheless taken out of them again, because the words following are inapplicable to it—namely, " on the average of the profits . . . . for one year from the period of the first setting up of the same." It is not " profits made during one year, etc.," nor would there be any occasion to employ the device of an average, if the only reference is to a case where the trade has been set up for a year or more and the amount of the last year's profits can be taken and

taxed as the profits of the next year—namely, the year of charge. What is contemplated is a computation, which, by means of an average, will get at profits for a year as well as one which will proceed on a computation of "profits for a year," that is of annual profits, extracted out of a period of a year or more by the process of averaging the profits of that more extended period.

The language of the rule in the present Consolidation Act differs from that in which it is expressed in the Act of 1842. It previously ran: "provided always that in cases where the trade . . . . shall have been set up . . . . within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." This, though archaic and cumbrous, at any rate as a proviso to the case of trades set up three years or more before the year of charge, covers both the remaining cases of setting up trade before the commencement of the year of charge—namely, a setting up more and a setting up less than one year before it—and the same formula is used for both. Presumably a Consolidation Act introduces no changes except changes of words and arrangement. If this change in words, or rather the change made in their order by transposing the words "for one year," nevertheless made a change in the meaning on ordinary principles of construction, it would be necessary to give effect to it, but on consideration I do not think that it does.

No real assistance seems to be derivable from the Rules applicable to other Schedules than D, or to other forms of taxable property than profits and gains. I think that counsel for the Inland Revenue was warranted in saying, that, if the Act does not confine the computation to a period ending just before the commencement of the year of charge by the express language in which the rule is couched, then nothing is prescribed as to the method by which the computation in the present case is to be made, and it must be made on such facts as are available. This would permit recourse to the profits made in the year of charge or part of it. The symmetry of the general scheme might be thereby impaired,

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but the method of computation in question must necessarily be a matter for express prescription, and not an inference from other cases, as to which it is expressly prescribed, to the present, as to which it is not. In any case, the so-called scheme, which substitutes a notional year's profits, taken before the year of charge, for the actual profits made in the year of charge, is departed from, symmetry or no symmetry, when the business is set up in the year of charge. If the scheme is inapplicable in one case, why not in two ? The Act leaves it there. I should agree with this, if I did not think that, on the proper construction of the material rule, the present computation falls within it.

So far as authority goes the *Burntisland* case (1) supports the view which I have felt constrained to take. The Lord President and Lord Cullen have given clear and terse explanations of the method prescribed, which I respectfully adopt. The contrary construction, adopted in the earlier *Glensloy* case (2), is weakened by the misapprehension, into which the Court seems to have fallen there, as to the connection of the words " balance of profits or gains " with some balance sheet of the taxpayer's, supposedly drawn up for a period of a year ending during the year of charge. I think that the appeal should be allowed and that the judgment of Rowlatt J., which affirmed the Commissioners' decision, should be restored on the grounds above mentioned. There may have been other points arising out of the assessment which, had the amount at stake been greater, would have been successfully disputed. These have not been raised before your Lordships, and accordingly no opinion upon them is involved in this conclusion. I move your Lordships accordingly.

I am desired to add that my noble and learned friend Lord Carson concurs in this opinion and motion.

LORD ATKINSON. My Lords, this is an appeal from an order of His Majesty's Court of Appeal (Lord Hanworth M.R., Scrutton and Sargant L.JJ.), dated April 26, 1926, reversing

(1) 1923 S. C. 449. (2) 1914 S. C. 549.

an order of Rowlatt J., dated June 18, 1925, affirming the decision of the Commissioners for the Special Purposes of the Income Tax Acts (hereinafter referred to as "the Commissioners") upon a case stated by those Commissioners for the opinion of the King's Bench Division of the High Court of Justice, pursuant to s. 149 of the Income Tax Act, 1918.

The question for decision in the case turns upon the construction of the relevant provisions of the Income Tax Act, 1918, and resolves itself into this, whether in computing the trading profits of the appellants for assessment under Case I. of Sch. D, Income Tax Act, 1918, for the year ending April 5, 1920 (the appellants' second year of assessment), the trading profits made in that year should be taken into account in arriving at the measure of the liability to be taxed. No question of figures arises in the case.

Profits of trade are subjected to income tax under Case I., Sch. D, the relevant statutory provisions contained in the Income Tax Act of 1918.

Those portions of the Schedule run as follows:—

"1. Tax under this Schedule shall be charged in respect of:

"(*a*) The annual profits or gains arising or accruing . . . .

"(ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; . . . . in each case for every twenty shillings of the annual amount of the profits or gains,"

"2. Tax under this Schedule shall be charged under the following cases respectively; that is to say: Case I. Tax in respect of any trade not contained in any other Schedule . . . . and subject to and in accordance with the rules applicable to the said cases respectively."

The Rule applicable to Case I. runs as follows: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average

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of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up." This is the main and general provision of the Act. From its terms it is clear that the materials upon which the assessment is to be made are the average of the profits and the gains made in the three years immediately preceding the year of assessment. The profits and gains made in any particular portion of the year of assessment are apparently not to be taken into account in making this assessment. That would seem to be clear.

Provision is made in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. for cases where a trade, profession, employment, or vocation is set up and commenced within this period of three years. The rule in clear and explicit language enacts that the computation shall in that case be made on the average of the profits and gains for one year from the period of the first setting up of the same. This portion of the rule is very inappropriately worded. It apparently refers only to the profits and gains for one year, the first year of the trading, but an average, properly speaking, can only be made when one has two or more things to compare. What the provision may fairly be construed to mean, I think, is that the rate of profit made in the first year of trading may be taken to have continued to be reached during the period from the end of the first year in which the trade is carried on up to the first day of the year of assessment. For instance, if the profits made in the first year of trading were on an average of the fifty-two weeks 10*l.* per week, the profits for the second year of trading might be taken as 10*l.* The rate of profit can be ascertained by taking an average on the fifty-two weeks of the first year. There is nothing unreasonable or unfair to a trader in holding that during the time which elapses between the end of the year in which he commenced to trade and the first day of the subsequent year of assessment he will be assumed to continue to make profits at the same rate at which he made them during the first year of his trading. This would appear to me to be, at all events, clear,

that the general rule is not to be departed from, and that profits made during any portion of the year of assessment are not to be taken into account in cases such as this. Where the trade has been set up within the year of assessment neither the general rule nor the last mentioned method of calculation can apply, and accordingly a special provision is made for it. That provision is contained in the last two and a half lines of r. 1, sub-r. 2, Cases I. and II., and runs thus: "Where it (i.e., the trade, etc.) has been set up and commenced within the year of assessment the computation shall be made according to the Rules applicable to Case VI." On turning to those rules one finds that by the second of them it is provided that the computation shall be made either on the full amount of the profits made during the year of assessment, or according to an average for such a period being greater or less than one year, as the case may require, and as may be directed by the Commissioners; and by r. 3, providing that every such statement shall be made to the best knowledge and belief of the person in receipt of and entitled to such profits and gains.

The three cases are thus provided for. First, where the trade has been carried on during the full period of three years anterior to the first day of the year of assessment; second, where the trade has been first stated within those three years; and third, where the trade has been set up within the year of assessment, but I have searched in vain to discover any case in which the period of three years on the profits made in which the trader may be assessed may comprise a certain period lying without the year of assessment, and a certain period within it. I do not believe such a hybrid period is ever recognized by the legislation on the subject of the income tax, as a period the profits made in which are to be subjected to taxation. The House has no power to come to the aid of the Legislature and insert such a period as a unit of computation where the Legislature has failed to do so.

The facts of this case are as follows: The respondent firm set up and commenced a new business on March 1, 1919.

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They took stock, and made up the first account of their business on December 31 in the same year 1919. Why they did this is irrelevant. The profits of the business for this period of ten months amounted, according to this account—the accuracy of which is not challenged—to 1000*l.* On February 6, 1920, that is before the first day of the year of assessment, they agreed to sell their business, its goodwill and assets, as and from January 1, 1920, to the respondent company, which latter was incorporated on February 16, 1920, and on March 1 adopted the agreement for sale of February 12 previous. The members of the respondent firm were the sole members of the respondent company. The respondent company have since continued to carry on the business by them so acquired. From motives wise or unwise it made up an account of its business from January 1, 1920, to March 31, 1920. For this period their profits—it is not disputed—amounted to 12,150*l.* The respondent firm was assessed on February 3, 1923, for the year 1918–1919 to income tax in respect of the profits of their trade from March 1, 1919, to April 5, 1919, in the sum of 117*l.*, the same being a due proportion of the sum of 1000*l.* shown by their accounts to have been their profits for the ten months ending December 31, 1919.

The Commissioners decided that the liability of the appellants should be based on the accounts to December 31, 1919, without regard to the accounts up to March 31, 1920, and reduced the figure contended for by the appellants to 1200*l.* As I understand the judgment of Rowlatt J. he held in accordance with the decisions in the two Scottish cases—namely, the *Glensloy* case (1) and the *Burntisland* case (2)—that the period over which the profits were to be calculated in such a case as this is that though no terminus ad quem is distinctly named in r. 1 of the Rules applicable to Cases I. and II. of Sch. D, yet according to the principle underlying the general provision of the statute, that terminus must be the first day of the year of assessment. If so, I entirely concur with him. As I understand the judgment of the

(1) 1914 S. C. 549. (2) 1923 S. C. 449.

Court of Appeal, the profits of the appellants are to be computed over a period extending beyond the first day of the year of assessment and extending to the end of the thirteen months, that is, to the end of the first trading year of the appellants' trading, which would necessarily include a portion of the year of assessment. With all respect, I am quite unable to concur in that conclusion. Scrutton L.J. is reported to have expressed himself thus (1): "Yet considering that Parliament contemplates a shorter period than three years as the foundation of the average, and I think contemplates that the foundation of the average is a period of fact, not estimate, I have with considerable hesitation come to the conclusion that the Commissioners and Rowlatt J. have taken a correct view of the case, and that the period from which the average is derived terminates at the commencement of the year of assessment, or possibly on the date preceding that year to which the accounts of the trader are usually made up, if such a date exists." I concur with the learned Lord Justice in the conclusion at which he has arrived, and, as I have failed to find a single instance in the whole Income Tax Code in which where the trader's trading commenced outside the year of assessment that year or any portion of it has been included in the period for which the trader's profits are to be measured and assessed, I concur in the learned Lord Justice's conclusion without the hesitation to which he gives expression. I think the appeal should be allowed and the judgment of Rowlatt J. should be restored and approved.

LORD WRENBURY. My Lords, the language of s. 100 of the Act of 1842 was "the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." The language of the Act of 1918 is "the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same." I agree with Lord Sumner in thinking that the transposition of the

(1) [1926] 2 K. B. 307.

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words "for one year" in a Consolidation Act does not make a change in the meaning.

The language of the Act of 1918 can be read as if it were "the computation shall be made on the average of the profits or gain (for one year) from the period of the first setting up of the same." The "one year" is the year of assessment. The "period of the first setting up of the same" must, I think, mean "the period from the date of the first setting up of the same." Even then the date is not named at which "the period" is to end. This must, I think, be the date referred to in Sch. D Rule applicable to Case I. That is to say, a date not later than the first day of the year of assessment. This "period" may be more or less than a year.

Further, the words "profits or gains" are followed not by the preposition "of" but by the preposition "for," a word which is appropriate if it is to be read in the connection "the computation shall be made for, etc.," which was the sequence of the words in the Act of 1842.

Neither the Act of 1842 nor the Act of 1918 specifies the items whose average is to be ascertained. It is impossible to have an average unless two or more sums are under consideration. An average of the profits for a period is not intelligible unless the period is to be in some way considered as consisting of several parts. This consideration is reached if the meaning is that the average of the weekly or monthly profits over the number of weeks or the number of months that have elapsed during "the period" is the average to be computed, and that this average sum is to be attributed to the whole of the "one year," i.e., the year of assessment. I think this is the meaning. I agree with Lord Sumner's judgment, and think that the appeal should be allowed.

LORD BLANESBURGH. My Lords, for convenience of reference and at the risk of repetition I will begin by setting out r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. under Sch. D with the words placed in the order in which it is agreed that for the purpose of construing the rule they

may properly stand: "Where the trade . . . . has been set up and commenced within the said period of three years the computation shall be made for one year on the average of the profits or gains from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment the computation shall be made according to the rules applicable to Case VI."

My Lords, on this sub-r. 1 I venture to observe as follows:

First of all, it is sufficiently clear that the expression "the profits or gains from the period of the first setting up of the same" are the equivalent of "the profits or gains arising or accruing during the period commencing with the first setting up of the same." In other words, except that the profits are those arising during a different period, the operation of averaging and its purpose and result are the same under this sub-rule as is the operation directed by Case I.

Secondly. The "period" whose profits are to be averaged is identified by reference to another period referred to in the sub-rule as "the said period of three years," and the reference is made in a form which to my mind connotes that it is a shorter period than the period so referred to.

Thirdly. It is a period which commences after the other period has, in point of time, begun. It commences "within" that period.

These considerations together strike me as almost necessarily and without more leading to the conclusion that the two periods are treated as ending at the same date. But when to them is added this further consideration that the shorter period in question must commence before the year of assessment—a condition shown by the later part of the sub-rule and one not only consistent with but confirmatory of the view that it does not continue after that date—this conclusion becomes inevitable if it be found that the same characteristic applies to the said period of three years itself. And that this is so appears from the description of that period given in Case I. to which this sub-rule is, as I entirely agree, in the nature of a proviso. That period is

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there described as one of three years, "ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up or on the fifth day of April immediately preceding the year of assessment."

In the present case I cannot doubt that the "period" ended on April 5, 1919, and as it seems to me the profits of this trade for the year April 6, 1919, to April 5, 1920, must accordingly be computed on a fair and just average, for a year, of the profits or gains which arose or accrued between March 1, 1919, when the trade was first set up, and April 5, 1919.

My Lords, I think that much of the difficulty which has beset this particular case is attributable to the final importance wrongly, as I believe, attached to the balance sheet made up to December 31, 1919—a date which, in itself, has no relevance on the question at issue. I think the difficulty is further due to the fact that the light cast upon the whole of sub-r. 2 by the reference in it to "the said period of three years" has not been fully utilized.

For these reasons I am in entire agreement with the rest of your Lordships as to the effect to be attributed to that sub-rule and as to the proper result of this appeal.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondent to pay the costs in the Court of Appeal and also the costs in respect of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 4, 1927.

Solicitors for the appellants: *F. B. Brook, for A. V. Hammond & Co., Bradford.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

BLATCHFORD . . . . . APPELLANT; AND STADDON AND FOUNDS . . . . . RESPONDENTS.

H. L. (E.)* 1927 *April* 4.

Workmen's Compensation—Industrial Disease—Painter—Lead Poisoning—Liability of last Employer—"Employment to the nature of which the disease was due"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1, *and Sch. III., as extended by Order of February* 26, 1918 [*S. R. & O.*, 1918, *No.* 287].

The appellant, a painter, claimed compensation from the respondents, a firm of builders and house decorators, in respect of disablement caused by lead poisoning. The appellant first contracted lead poisoning in 1918. His last employment as a painter was with the respondents from October to December, 1924, when he left owing to illness. In July, 1925, the certifying surgeon certified that he was then suffering from lead poisoning, and was thereby disabled from earning his full wages at the work at which he had been employed. The certificate gave no date for the commencement of the disablement, so that under s. 8, sub-s. 4, of the Workmen's Compensation Act, 1906, it was deemed to have commenced at the date of the certificate. The arbitrator found that there was nothing in the nature of the appellant's employment with the respondents to justify the conclusion that the disablement was due to that employment and made an award in favour of the respondents:—

Held, that to entitle a workman to compensation under s. 8, sub-s. 1, of the Act of 1906 it is sufficient for him to prove that his work with his last employer during the twelve months previous to the date of the disablement was of the same nature as the work to which the disease was due; and that consequently the appellant was entitled to compensation.

Dean v. *Rubian Art Pottery, Ld.* [1914] 2 K. B. 213 overruled on this point.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an award made by the county court judge of Devon under the Workmen's Compensation Acts, 1906–1923.

The appellant, a painter, claimed compensation from the respondents, a firm of builders and decorators, in respect of disablement caused by lead poisoning. The appellant was in the Navy until 1918 as a painter and during his service he contracted lead poisoning. Since his discharge he was employed as a painter in 1920 and again from the beginning of

* *Present:* VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, LORD CARSON, and LORD BLANESBURGH.

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1923 until July, 1924. In mid-September, 1924, he was employed for a month by Messrs. Woolacot & Son. On October 23, 1924, he entered the respondents' employment and continued therein until December 12, when he left owing to an illness which was diagnosed as due to cardiac trouble, but was, in fact, as the arbitrator found, lead poisoning. On July 13, 1925, the certifying surgeon certified that the appellant was then suffering from lead poisoning and was thereby disabled from earning his full wages at the work at which he had been employed. An appeal by the respondents to the Medical Referee against this certificate was dismissed. The certificate gave no date as that on which the disablement commenced, so that under s. 8, sub-s. 4, of the Act of 1906 the disablement was deemed to have commenced on the date of the certificate.

The appellant claimed that he was entitled to compensation under s. 8, sub-s. 1, from the respondents as being the last employers who had employed him within twelve months previous to the date of disablement in the employment to the nature of which the disease was due.

The respondents resisted the claim on the ground that the disease was not contracted while the appellant was in their employment, nor was it aggravated or accelerated during that employment. They also claimed to be entitled to contribution from Messrs. Woolacot & Son, who were added as third parties for that purpose, but did not appear.

The county court judge, in giving judgment, said that the evidence failed to satisfy him that there was anything in the nature of the appellant's employment by the respondents that would in itself tend to aggravate or accelerate the process of the disease from which he had apparently been suffering for a considerable number of years, so that he could find that it was due to such employment that the lead poisoning became so acute as to render him disabled, and, on the authority of *Dean* v. *Rubian Art Pottery, Ld.* (1), he made an award in favour of the respondents.

The Court of Appeal (Pollock M.R., Scrutton and Sargant L.JJ.) affirmed the award.

(1) [1914] 2 K. B. 213.

1927. Jan. 27, 28. *Edgar Dale* and *Montague Berryman* for the appellant. The county court judge held that the onus was on the workman of proving that the disease of lead poisoning was due to his employment by the respondents, as the interval of seven months between the date of his disablement and the termination of his employment by the respondents prevented it being said, within sub-s. 2 of s. 8 of the Workmen's Compensation Act, 1906, that he was employed by them at or immediately before the date of his disablement, the consequence being that the respondents had not to prove that the disease was not due to the nature of his employment by them, and he based his decision upon *Dean* v. *Rubian Art Pottery, Ld.* (1) If that case were rightly decided this appeal would necessarily fail, as it also decided that under s. 8, sub-s. 1, of the Act of 1906 the workman to be entitled to recover compensation must show that the disease was due to lead poisoning arising out of the employment with the respondents. It is submitted that that decision is wrong in the latter part. English decisions have followed it, but the Scottish Courts have not. The Workmen's Compensation Act, 1897, did not compensate the workman for injury by industrial disease at all, but in 1906, when industrial diseases were for the first time included, the view prevailed that it ought not to matter which employer caused the disease, but that the workman ought to be given the opportunity of recovering from some definite employer, who should be given rights of indemnity against any other employers proved to be liable. The wording used in ss. 43 and 44 of the Workmen's Compensation Act, 1925, is the same as that in s. 8 of the Act of 1906, and the Act of 1923 does not affect the question here.

The Scottish Courts followed *Dean's* case (1) for a time until the case of *Docherty* v. *Archibald Russell, Ld.* (2), which decided that it was sufficient for the workman to prove that the last employer employed the workman in the same process only and that it was not necessary that he should also prove that the employment with the last employer aggravated the

(1) [1914] 2 K. B. 213. (2) 1918 S. C. 115.

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disease. The Court of Appeal held the county court judge had rightly applied *Dean's* case (1), and that there was evidence to support his finding that the disease had not been aggravated by the period of the employment with the respondents, the last employers. The design of the Workmen's Compensation Acts was to compensate a workman injured in his employment and to charge that on the industry he was engaged in. The last employer must prove that a previous employer is liable and cannot evade liability by only proving that the disease was not contracted in his employment. It is to be kept in mind that the workman was carrying on a trade which gradually promotes the disease. [He also relied upon *M'Gowan* v. *Merry and Cunninghame, Ld.* (2), and *M'Taggart* v. *William Barr & Sons.* (3)]

It only becomes relevant to consider when the disease was contracted when it is one of sudden onset. The scheme of the Act is that workmen should be paid compensation, and where the money is to come from is a secondary point.

William Shakespeare and *J. L. Pratt* for the respondents. It is clear that the Act, as far as preamble and s. 1 go, cast the liability for compensation on employers in whose employment the accident happened, and those reasons as to accidental injury must be held to apply also to s. 8. Has this Act of 1906 made it quite clear that the liability is to be thrown on the last employer though he may show he had nothing to do with the causing of the disease? [He referred to *Ocean Coal Co.* v. *Davies.* (4)]

The earlier Scottish cases are in agreement with *Dean's* case (1), and there is no such marked conflict between the English and Scottish view of the matter as has been suggested. The last employment means "the last relevant employment"—the employment, that is, which has contributed to the disease. The workman in his request for arbitration himself propounds the question whether the disease was in fact contracted whilst he was in the employment of the respondents. He must show that the disease is due to his employment

(1) [1914] 2 K. B. 213.
(2) 1915 S. C. 34.
(3) 1915 S. C. 224.
(4) Ante, p. 271.

by the respondents, and that is a question of fact for the county court judge, who has found it was not so contracted.

Dale replied.

The House took time for consideration.

1927. April 4. VISCOUNT SUMNER. My Lords, the appellant is a painter by trade, and the respondents a firm of builders and decorators. On December 12, 1924, the appellant, who was then and had been for seven weeks in the respondents' employment as a painter, left them owing to illness. Though his panel doctor did not for a long time detect it, he was then suffering from lead poisoning, a disease from which he had suffered six years before. The learned arbitrator, in summing up evidence which was sufficient to warrant his finding, said that it showed that "there was nothing exceptional in the nature of the work that the applicant was called upon to perform whilst in the respondents' employment. It has failed to satisfy me that there was anything in the nature of his employment by the respondents that would of itself tend to aggravate or accelerate the process of disease, from which the applicant had probably been suffering for a considerable number of years, so that I can find that it was due to such employment, that the lead poisoning became so acute as to render the applicant disabled." It has, however, turned out that the disablement is permanent. The applicant has not worked since he left the respondents' employment. Lead poisoning was eventually diagnosed in June, 1925, and a certificate was obtained from the certifying surgeon that he was suffering from effects of lead poisoning and was thereby disabled from earning full wages at the work at which he had been employed, a conclusion subsequently affirmed by the Medical Referee on appeal. The certifying surgeon, not being able to certify a date on which the disablement commenced, duly deleted the words in the form of certificate which fix the date of commencement, and under the Act the commencement is deemed to

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have been the date of the certificate, namely, July 13, 1925. The applicant's last employment was not at or immediately before this date, and accordingly he did not enjoy at the hearing the benefit of the presumption which arises under s. 8, sub-s. 2, of the Act of 1906. The issue then may be briefly stated as follows: Has the applicant, in the state of facts found by the learned arbitrator, proved enough to establish a right to receive compensation from the respondents? He says in this appeal that he has, for he has proved that within the period limited by s. 8 he suffered from one of the scheduled diseases due to the nature of his employment as a workman, who handles lead paint in connection with his work as a painter. The respondents say that he has not, for he has not proved that his suffering arose out of his employment by the respondents, and that nothing in the Act, either clearly or at all, makes them liable for a misfortune, which did not arise out of or in the course of some employment by them, nor, without the clearest words, can persons be called on to pay compensation to a workman when their employment has not in any way affected a disabling disease contracted elsewhere. The arbitrator's award in the respondent's favour was affirmed by the Court of Appeal, bound as they were by the decision in *Dean* v. *Rubian Art Pottery, Ld.* (1) In effect it is that case which is now under appeal, but the question really depends not on authority but on the construction of the Act of 1906, s. 8, sub-s. 1.

When the Workmen's Compensation Act of 1897 was re-enacted, as amended, in 1906, the Legislature decided to introduce into it a provision dealing with diseases, which affect those who use certain processes in their trades, commonly called "industrial diseases." A schedule to the Act specifies some of these diseases, and s. 8 of the Act is the code which regulates them. Under the Act of 1897 and the earlier sections of the Act of 1906, the subject of compensation is injury or death due to "an accident arising out of and in the course of" the workman's employment, and an "accident" (a word which is not defined by statute) is spoken of in

(1) [1914] 2 K. B. 213.

its ordinary sense. As a mere matter of drafting it would have been easy to enact in 1906 that disablement or death, caused by any of the scheduled diseases, should be deemed to be an "accident" within the Act of 1897 and the corresponding sections of the Act of 1906 and should be compensated accordingly. This, however, would only have been the beginning of trouble.

An accident may result in an attack of some disease and so become disabling, though not otherwise of any moment. In such a case the supervention of disease is a matter of chance and not of certainty, and to that extent is an accidental or fortuitous consequence, but no one in ordinary language would say that the illness was itself an accident. Hence, diseases, which, when they attack a workman, do so because of his trade and incidentally to it and to the processes which he uses in it, would not be within the words above quoted from the Act of 1897 without further legislation and could not be brought within its fundamental principle merely by calling them "accidents." Their peculiar character made much more extensive provision necessary. They come on gradually; their first steps may not be perceptible for some time; their rate of progress may vary widely; they have their ups and downs. The patient sometimes makes a complete recovery and sometimes only an apparent one, and the periods, during which they may be quiescent and latent, may vary greatly. In the case of such diseases an applicant, who had not been long in the employment of the respondent, would naturally be met with the suggestion that his disease had been previously contracted and therefore did not arise out of it, and in meeting this defence by proof that it actually arose during and out of his employment by the respondent he might well find the difficulty insuperable. It appears to be common ground, and rightly so as far as I know, that this fatal disadvantage may often occur and that the Legislature must have been aware of it. If there was to be an effective remedy, much more had to be done than simply to declare the disease to be an accident. Means had to be found for

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enabling the workman to recover compensation from an employer even though he could not prove the precise time when the disease was contracted.

I will therefore examine s. 8, sub-s. 1, itself. The scheme, as applicable to the present case, is this. A workman, disabled from work through suffering from a scheduled industrial disease, of which it can be predicated that it is due to the nature of his employment within twelve months before his disablement, is to be entitled to compensation under the Act of 1906. How and on what conditions? The manner of his compensation is to be as if the disease were a personal injury arising out of and in the course of the trade, in which he was employed within the twelve months previous to the date of the disablement and to the nature of which the disease was due, the disablement being treated as being the accident. The conditions are these. The person from whom the compensation is to be recoverable shall be the employer who last employed the workman during the said twelve months. Its measure is to be the workman's earnings under that employer, and it is to that employer that notice of the disablement is to be given. It will thus be seen that the modifications, subject to which compensation is to be recovered, as in the case of an accident under the Act of 1897, are considerable. They are intended to obviate the disadvantage which would handicap the workman if he had to prove disablement by disease, as if for an accident under the Act of 1897 and the equivalent sections of the Act of 1906, and they provide a means, perhaps rough and ready, of enabling a suffering workman to get compensation from some one certain, in respect of a disease contracted at a wholly uncertain time.

Provisoes are finally added to mitigate the hardship of exacting compensation from an employer whose employment may not be shown to have had and may not actually have had anything to do with the onset or the progress of the disease or with the ultimate disablement of the workman. He is to have the opportunity of recovering over part or

even the whole of the compensation from others, whose employment of the workman during the twelve months in question in processes, from the nature of which such a disease arises, may have been its source in fact. To enable this employer to bring such other employers into the proceedings and to have his own claim over disposed of at the same time as the workman's, the latter is to give him information as to the names and addresses of such other employers, failing which, or if, though given, his information is insufficient to enable the proceedings mentioned to be taken against them, the employer sued is to be allowed to negative any liability to pay compensation by proving that the disease was not contracted while the workman was in his employment.

My Lords, I think that a scheme is thus disclosed for bringing industrial diseases into the Act of 1906, which substantially meets their peculiar features mentioned above. The way in which this is done sufficiently meets the objection that, unless shown in the clearest words, an intention cannot be imputed to the Legislature to make one employer pay for what was entirely due to the service of others. The intention is clear. The objection was pointedly phrased by saying that "the last employer" named in the section must mean "the last relevant employer," the last employer in point of time, out of and in the course of whose employment the disease had wholly or partly arisen. I think that the scheme of the section is on its face such that the last employer cannot be thus limited. The ground for making him the person from whom compensation is to be recoverable, is that he is a person certain and designated, upon whom the workman may claim without being sent from pillar to post. It is contemplated that contribution may be recovered over to a substantial extent, and for the rest the employer must protect himself by insurance, the cost of which will form part of his trade outgoings. The paternal benevolence of the Legislature towards workmen is well known, and if the price of that benevolence is paid by the last employer, who thus has to bear others' burdens, that is nothing new in this

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kind of legislation, nor is it done to an extent that need surprise any one who has fully digested the position in which the Act of 1897 had already placed employers.

Turning now to particular expressions in the section, I would observe :—

(*a*) In construing the Act effect must be given to the words "to the nature of." Their meaning cannot be the same as if the section had simply said "is due to" any employment. I think they are inserted because this part of the section is not concerned directly with something arising out of the particular service of the particular employer sued, but with results which are incidental to the class of employment, in which the workman has served several employers. If the disease is incidental to that class of employment so that it can be attributed to service therein, then he is to be compensated, as if something could be proved, which ex hypothesi may not be proved—namely, as if an accident had arisen out of and in the course of that employment under a particular employer and at a particular time and had been proved to have so arisen. The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident. This is in favour of the workman. The employer, per contra, gets the provision that the proof of the disease is to be given by the certificate of the certifying surgeon, and if the surgeon cannot determine when the disease was contracted, the date of his certificate is to be taken as arbitrarily fixing the time of that event. If the suggested limitation of the relevancy of the last employer were adopted, the anomalous result would be that the date of the accident would be fixed, but its connection with the employment, then or last previously subsisting, would be at large, and the workman's difficulties, arising in any case from the gradual appearance of the symptoms of his disease, would be aggravated by his being tied to a date for the accident, which might be long after the time when the disease was really contracted.

(*b*) The workman's proceedings are imperatively fixed by

the words "compensation shall be recoverable." No power to implead other employers for his compensation is given to him, but, on the contrary, express power to bring in other employers and prove them liable is given to the last employer, and to him alone. The section treats the statutory compensation as one compensation, recoverable by the workman from the last employer, unless, by the action of that last employer in joining a prior employer and in proving his allegation in the terms of proviso (ii.), such compensation becomes recoverable in the proceedings already begun by the workman from that prior employer, who has thus become the employer from whom the compensation is to be recoverable.

(*c*) The words in s. 8, sub-s. 1 (*b*), and those at the end of proviso (i.) specify expressly the only events in which the compensation shall not be recoverable from the last employer, and thereby exclude any implication that it may also not be recoverable if the workman fails to show that his disablement by disease arose out of that last employer's service. Except in so far as proviso (ii.) applies, where one set of proceedings originally begun by the workman against the last employer is clearly contemplated, the only cases in which compensation is not to be payable by the last employer are cases where the workman has given insufficient or no information and the employer has then proved that his employment of the workman had nothing to do with the disease and the case of the wilfully false representation made by the workman to which s. 8, sub-s. 1 (*b*), refers.

For these reasons I think, on the construction of the Act itself, that the appeal succeeds, and it follows that the contrary view expressed in *Dean* v. *Rubian Art Pottery, Ld.* (1), is one that, with all respect to the Court of Appeal, I cannot accept. It has already been criticized (*M'Taggart* v. *Barr & Sons* (2)), and departed from (*Docherty* v. *A. Russell, Ld.* (3)) in the Court of Session. The crucial error in the judgments in *Dean's* case may be found in the view, that

(1) [1914] 2 K. B. 213. (2) 1915 S. C. 231.
(3) 1918 S. C. 115.

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the nature of the employment mentioned in sub-s. 2 means the nature of the particular employment with the respondents (1), and that proof, that the disease was not in any degree due to the nature of the employment under the respondent, means not caused or produced in his employment. I think that the appeal should be allowed, that the award made by the arbitrator should be set aside, and that the case should be remitted to him to find the amount of compensation due to the applicant and, if necessary, to deal with any claims over against any other employer, which may be substantiated by the respondents. I move your Lordships accordingly. I am desired to say that my noble and learned friend Lord Carson concurs in this opinion and motion. I would gratefully add that I have felt myself much indebted to the very clear arguments of the learned and experienced counsel who addressed us on behalf of the respective parties.

LORD ATKINSON. My Lords, this is an appeal from an order of His Majesty's Court of Appeal in England, dated February 9, 1926, dismissing an appeal by the present appellant from an award made by His Honour Judge Higgins at the county court of Newton Abbot, Devon, in favour of the present respondents in an arbitration under the Workmen's Compensation Acts, 1906 to 1923, dated December 18, 1925, whereby the said judge awarded that the present appellant was not entitled to receive compensation from the present respondents in respect of incapacity from lead poisoning, and further ordered the present appellant to pay to the present respondents the costs of the arbitration.

An application for arbitration under the Workmen's Compensation Acts, 1906 to 1923, dated August 24, 1925, was filed in Newton Abbot County Court of Devon by Alfred James Blatchford, the present appellant, against Staddon and Founds, the present respondents.

The relevant facts of the case to which it is most important to have close attention are clearly set forth in the judgment of the county court judge, and are repeated with accuracy and all

(1) [1914] 2 K. B. 220, 223, 225.

necessary fulness in the judgment which the Master of the Rolls delivered in the Court of Appeal. He set them out as follows :—

The applicant, who is a painter, claims compensation from the respondents, who are builders and decorators, in respect of disablement caused by lead poisoning. The applicant is fifty-three years old, and was in the Navy until 1918 as a painter. During his service there he contracted lead poisoning, a definite symptom whereof, namely, drop wrist, showed itself during that period. Since his discharge from the Navy the applicant worked as a painter during 1920. From the beginning of 1923 until July, 1924, he was in the employment of Mr. Battershill. From July to mid-September, 1924, he was out of work, and from mid-September to mid-October, 1924, he was employed by Messrs. Woolacot & Son. After ten days' unemployment the applicant entered the respondents' employment on October 23, 1924, and remained therein until December 12, 1924, when he left owing to illness. He then saw his panel doctor, who diagnosed his condition as being due to cardiac weakness ; and the learned judge held, upon evidence which was ample to enable him to do so, that the applicant was suffering, and had been suffering ever since his employment in the Navy, which ceased in 1918, from lead poisoning. On July 13, 1925, Dr. King, certifying surgeon, gave his certificate to the effect that the applicant was then suffering from the effects of lead poisoning. That means that after being absent from painting work, and absent from the employ of the respondents for seven months, he then got a certificate that he was suffering from the effects of lead poisoning.

Difficulties have arisen when dealing with cases similar in character to the present in construing a number of enactments aimed at engrafting on legislation designed to secure to workmen compensation for injuries by accident arising out of and in the course of their employment (accidents which necessarily happened at particular points of time) incapacity to work caused to a workman by certain industrial diseases, which, in most instances, develop slowly, often abate in virulence, and frequently recur with disabling effects.

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There is nothing similar in the events which bring these two species of disablement or injury into effect. To repeat: In 1920 the appellant worked as a painter for a Mr. Williams. From early in 1923 to July, 1924, he worked as a painter for a Mr. Battershill. From that date in July, 1924, till September in that year he was out of employment. From September 15, 1924, till October 13 he worked as a painter for Messrs. T. A. Woolacot & Son, during which time he stated he was in normal health. On October 23, 1924, he started to work as a painter with the respondents. In close on two months afterwards, namely, December 12, 1924, when he was afflicted with "general debility" which affected his hearing, he left that employment, but only obtained a certificate from a certifying surgeon on July 13, 1925, that is, seven months after he had ceased to work for the respondents; he obtained a certificate from the certifying surgeon, Dr. Colin King, certifying that he was suffering from the effects of lead poisoning and was thereby disabled from earning full wages at the work at which he had been employed—no date is mentioned in the certificate as to when this disablement commenced. The commencement of the appellant's disablement must, therefore, under s. 8, sub-s. 4, be taken to be July 13, 1925.

The respondents appealed against this certificate to the Medical Referee, Dr. J. Raglan Thomas, who, on August 21, 1925, dismissed the appeal and certified that Blatchford was then suffering from lead poisoning and was thereby disabled from earning full wages at the work at which he was employed. Sect. 8, sub-s. 2, of Appendix 9 of the Workmen's Compensation Acts, 1906 to 1923, evidently does not apply to this case, as the workman was "not at or immediately before the date of this certificate," July 13, 1925, employed with the respondents. That event took place seven months before the date of disablement, and therefore cannot be said to have taken place immediately before that date. The onus of proof mentioned in that sub-section did not exist: *Dean* v. *Rubian Art Pottery, Ld.* (1)

(1) [1914] 2 K. B. 213.

The county court judge, the proper judge of fact, found that on December 12, 1924, the day on which the appellant left the respondents' employment and also the day upon which the panel doctor found he was suffering from general debility affecting his heart, the evidence satisfied him that there was nothing exceptional in the nature of the work that the appellant was called upon to perform while in the respondents' service. The evidence, he says, failed to satisfy him that there was anything in the nature of his employment to aggravate or accelerate the progress of the disease from which the appellant had probably been suffering for a considerable number of years, so that he could not find that it was due to such employment that the lead poisoning became so acute as to cause the applicant to be disabled.

It is clear that the employer can, under s. 8, sub-s. 2, protect himself from liability (despite the conditions mentioned) by proving that the workman's disease was not due to his employment under the defendant. But it is contended that the respondent never can free himself from liability under s. 8, sub-s. 1, by proving, no matter how conclusively, the fact that the workman's disease was not contracted while he was in the employer's employment, but proving nothing more.

That result, which at first sight seems strange and rather unjust, is necessitated by the provision in s. 8, sub-s. 1 (*c*), to the effect that compensation shall be recoverable from the employer who last employed the workman during the twelve months antecedent to the latter's disablement. If he, the employer, were permitted to protect himself by proving simply the fact that the workman's disease was not contracted while he was in his employment, the workman would be placed in this difficulty, that he could not sue any of the other employers he might have worked under during the twelve months preceding his disablement, inasmuch as s. 8, sub-s. 1 (*c*), provides that compensation shall be recoverable from the employer who last employed the workman during the aforesaid twelve months. This provision necessitates that this last employer shall be kept before the Court as defendant, until he is released from liability under the contribution

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scheme in (*c*) (iii.). If the employer succeeds in proving, in addition to this fact, that the disease was contracted while the workman was in the employment of some employer other than himself, he may join that other employer as a party who shall thenceforth be treated as the employer by whom compensation is to be paid, but it seems to be clear that except through the operation of the contribution provisions and independent of s. 8, sub-s. 2, which does not touch his case, the mere proof by an employer that the disease from which his workman suffers was not contracted while he was in the former's employment will not apparently per se relieve him from liability. If the last employer proceeds to avail himself of the contribution provisions, he may obtain considerable relief in many cases. And it may well be that taking the general body of employers, this relief is not inadequate, and operates on the whole in their true interest.

The workman, therefore, is only bound under s. 8, sub-s. 1 (*c*), to prove that he was last employed by this employer during the twelve months immediately preceding his disablement in employment of the nature to which the disease was due; that was, in this case, lead painting.

The county court judge held that the onus of proof lay upon Blatchford to show that the lead poisoning from which he was suffering was, so to speak, brought to a head owing to the nature of his employment, and that he had failed to discharge his onus.

The learned Lords Justices took apparently, to some extent if not altogether, the same view. With all respect I do not think that it was necessary for the workman to prove that it was the employment with the last employer which, in fact, caused his disablement or suspension. It will, I think, be sufficient for him to prove that his work with his last employer during the twelve months immediately preceding his disablement was of the same nature and character as the work to which his disease is due. I think, therefore, that the appeal succeeds, and that the decision appealed from should be reversed and the decision of the county court judge set aside and this appeal allowed.

LORD WRENBURY. My Lords, I have found the construction of s. 8 of the Workmen's Compensation Act, 1906, so difficult that after perusing it again and again I am not sure that even now I can accurately state its effect. The difficulty arises, I think, from the fact that as it appears to me the draftsman, when he sat down to draw the section, cannot have had present to his mind any clear idea as to the test which he was going to impose to determine whether any particular employer was to be liable or not. Was the test to be that the workman was in the employer's service during the contraction of the disease so that the employer could be regarded as having contributed to its development, or was the test to be that the workman has been in the employer's service within some period of twelve months from a definite date fixed by a definite event such as suspension? Was it to be a defence that it was found as a fact that the workman suffered from the disease when he entered the particular employer's service and did not contract it in that service? The section oscillates among all of these. I have to find the test which I am to apply and have to reconcile as best I can the conflicting provisions which the section contains.

The Act of 1897 and the first section of the Act of 1906 had to do with the case of an accident properly so called. An accident, in most cases at any rate, happens at a point of time easily identified, and there is no difficulty in stating who is at that point of time the employer. In that class of case the statutory liability is quite plainly imposed upon the employer in whose employment the accident was suffered. The word used is "compensation." That word in general conveys that if one has injured another he is to compensate him for the injury. In the case in question the employer it is true has not injured the workman, but the injury has been suffered in the employment of the employer and has, so to speak, been suffered for his benefit. It was an essential factor for allocating liability that the accident was suffered in the employment of the employer.

In drawing s. 8 the draftsman was going to provide, not for an accident properly so called, but for an industrial

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disease as if it were an accident. The contraction of the disease was presumably to be attributed not to any one point of time, but to a gradual development over a long period of time—during which there might be many employers. Under these circumstances s. 8 does not provide new machinery, but creates the new liability referentially by the words "as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment" being an employment during a statutory period of twelve months provided for by the statute. [I may here interpolate that although there are three things which might be relevant in this context—namely (1.) "the disease" whatever that means; (2.) suspension within s. 8, sub-s. 1 (ii.); and (3.) a certificate of disablement within s. 8, sub-s. 1 (i.), yet two only of these are here mentioned. Is it possible that "disease" is a misprint in the Act for "disablement"?] The referential words above mentioned carry me back to s. 1, which requires that the accident be in the employment, and if the matter stopped there I should be able to say: "Ascertain the twelve months—the accident must be taken as happening every day during that time and every employer in the dangerous trade during that time is liable." But this is not what the Act says. It says that the disease or suspension is to be considered as the personal injury by accident. Does this mean that the contraction of the disease is the accident, or does it mean that the ascertainment in a defined way of the fact of the disease having been contracted is the accident? On the whole from that which I have to say further, I think it must mean the latter. For s. 8, sub-s. 1 (*a*), provides in express terms that the disablement or suspension shall be treated as the happening of the accident. Perhaps here "disablement" means certificate of disablement. Whether it means disablement in fact or certificate of disablement this is not a period of time over which the disease may have been contracted, but some particular point of time. So here I get back to a case similar to that of the accident properly so called, and the liability created by s. 1 attaches (if the referential words are to have

effect) only to the employer who was employer at that moment. But obviously that will not do; the liability attaches at any time within the statutory twelve months, that is to say, attaches to any person who was employer during that time, although he was not employer at the date of the accident.

But when I look further, I find that it is not enough to say the employer was employer during the twelve months; he may escape under s. 8, sub-s. 1 (*c*) (ii.), if he can find another employer within the twelve months and can prove that the disease was contracted whilst the workman was in the employment of that other employer and not whilst in his employment, in which case that other employer is to be the employer from whom the compensation is to be recoverable. Must this other employer have been an employer during the statutory twelve months? It seems to me that he must, for otherwise no liability has by anything which precedes been created in him. If this is so, this extraordinary result ensues. Suppose A. has employed the man for ten months and B. had employed him for the preceding two months, A. may by proper evidence escape and may pass on the liability to B. But if A. has employed the man for thirteen months he cannot do so, for B. is not liable in any case, and, however exhaustively A. may prove that the disease was contracted in B.'s employment and not in A.'s employment, A. is liable.

The considerations upon which I have last dwelt show that contraction of the disease in the employment is in some cases at any rate relevant to the question of liability. If the principle of s. 1 (namely, accident in the employment) is to have effect, it plainly ought to be relevant in all cases. But I cannot find that the Act says so.

In this particular case it is found as a fact that the disease was contracted in 1918, that the man then suffered from drop wrist, a definite symptom of lead poisoning, that there is no doubt that when he entered the respondents' service he was suffering from lead poisoning, and that there was nothing in the nature of his employment by the respondents to aggravate or accelerate the disease. In other words the

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respondents were no parties to the contraction of the disease. But on July 13, 1925, the workman was certified to be suffering from the disease and to be disabled, and by virtue of s. 8, sub-s. 4, this is to be taken to be the date of disablement, and by virtue of s. 8, sub-s. 1 (*a*), the disablement is to be treated as the happening of the accident, and the employment by the respondent was within the statutory twelve months, so that I am driven to say contrary to the real facts as found that the statute has rendered liable an employer whose service had nothing to do with the workman's unfortunate state of health.

I therefore find myself compelled to assent to the motion proposed.

LORD BLANESBURGH. My Lords, it was in this case found by the learned arbitrator that the appellant, when he left the respondents' service on December 12, 1924, was suffering from lead poisoning, and it was given in evidence by the appellant himself that when he was working for the respondents on some houses he used pure lead paint which he himself mixed and that he used the same paint when working for them on other houses. He was duly certified on July 13, 1924, to be suffering from the effects of lead poisoning and as being thereby disabled from earning full wages at the work at which he had been employed, and, being in no way in fault under s. 8, sub-s. 1 (*b*) or (*c*) (i.), of the Act, he claimed compensation from the respondents as his last employers under sub-s. 1 (*c*).

That the respondents' business is of such a nature as that lead poisoning may probably enough overtake those engaged in its processes is not disputed. No rebutting evidence was given, and in these circumstances it might well have seemed that the appellant, in proving what he did, had established within the meaning of s. 8, sub-s. 1, that his lead poisoning was due to the "nature of the employment" in which he had been employed within the prescribed period of twelve months, so that the liability of the respondents to make compensation to him as his last employers within that

period followed almost as of course. But it was contended by the respondents, and hitherto successfully, that they were under no liability in the matter. Not because the appellant's lead poisoning had not been contracted "in any process involving the use of lead or its preparations or compounds." That was not the contention. The appellant's disease had been so contracted. But it had been contracted some years before—when he was employed in the Navy—and the respondents' submission was that in respect of his consequential disablement they were not bound by the section to provide compensation for the reason that the appellant had not succeeded in showing as, in the words of the Master of the Rolls, he was required to show that the poisoning "was brought to a head or caused by or aggravated by or accelerated by the employment by the respondents." The main question on this appeal is whether the appellant was under any obligation to establish a further case of that kind as the condition of success in his present claim.

My Lords, the history and exceptional position of s. 8 in this statute has already been brought to your Lordships' notice. It is a new enactment dealing, as a code, with a new subject-matter for compensation—industrial diseases—upon conditions and with limitations peculiar to itself, whether as regards the workman entitled to claim compensation or as regards the employer or employers chargeable with its provision. The section is, and it should, I think, be regarded as being, sui generis, different, and, in view of the scheme of compensation embodied in it, necessarily different, both in its character and incidents, from those provisions of the statute which provide according to another arrangement of liability compensation for accidents more appropriately so called. I believe myself that most of its supposed difficulties have resulted from a misplaced endeavour to torture the provisions of the section into a correspondence with these other provisions of the Act to which I have referred, when there is not, and there was never intended to be between them, any correspondence at all. If the section in its entirety be read

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free from any such prepossessions and in accordance with the natural and ordinary meaning of the words employed in it, its terms, as it seems to me, are reasonably explicit.

In the present case, the immediate question is as to the true meaning of the words in sub-s. 1 : " due to the nature of any employment in which the workman was employed at any time within the twelve months," etc. It has been held by the Court of Appeal in *Dean* v. *Rubian Art Pottery, Ld.* (1), that these words are the equivalent in the present case of the words " due to the employment under the respondents," and that accordingly the appellant cannot here succeed unless he makes against the respondents such a case as the Master of the Rolls has paraphrased in the words I have taken from his judgment.

My Lords, if a conception so very simple as that imputed by this construction of it is alone intended to be conveyed by the expression in debate, it is permissible to ask why the Legislature should have chosen for use in the section no less than six times a phrase so oblique as that selected when the appropriate words of directness were so immediately at its hand. And this question has point added to it when another consideration is borne in mind. The word " employment " is not, as I think, in this phrase used immediately to describe the relation between employer and workman, a sense in which it is so frequently utilized throughout the Act and the sense in which the Court of Appeal in *Dean's* case (1) supposed it to be used here. In this phrase, as it seems to me, the word very clearly refers to the work or process in which the workman had been engaged and not to his contract with an employer to engage in it. If so the non-appearance in the clause of the direct words is explained. They would have conveyed a sense which was not intended.

But, my Lords, one must face the reason why the Court of Appeal in *Dean's* case (1) adopted the construction which it did. That construction, forced as it was, was chosen because thereby the Court was enabled to bring s. 8 into line with the rest of the Act in this, that it made liable to

(1) [1914] 2 K. B. 213.

provide compensation in respect of these diseases only an employer responsible in some sense for the workman's breakdown. And *Dean's* case (1) has received the imprimatur of two of the learned judges of the Court of Appeal in the present case in that such is the result of the section or at all events its tendency.

My Lords, it is, I think, clear that such is not its intent. It is demonstrable that such should not be its result if its paramount purpose to provide compensation for the disabled workman by the limited class made responsible for it was to be achieved. And it is the necessary effect of provisions in it which are quite free from ambiguity that the "last employer" in cases which may be not infrequent is alone liable to provide compensation for a workman's breakdown for which, in terms of the section itself, he is regarded as having no responsibility whatever.

My Lords, there are two classes of disease in terms mentioned in the section. There are, first of all, diseases which are definite in origin. There are, secondly, diseases which are described as being "contracted by a gradual process." Lead poisoning is in the second class. With regard to each class of disease the right to compensation arises only where the workman is disabled or suspended from work or dies as a result of it. There is no limitation of time in respect of the date at which a disease of the first class originated or at which the gradual process in a disease of the second class commenced. That date in each case may have been years before the consequential disablement or suspension or death. The workman or his dependants, however, are not by any such lapse of time deprived of compensation on disablement or suspension or death supervening. But the compensation can be recovered only if within twelve months the workman has been employed in an employment to the nature of which the disease is due and then only from the employer who last within that period so employed him. All this is clear.

And, my Lords, it is, I think, equally clear that in the

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event of disablement due to a disease definite in origin where in a case like the present the workman is not in default under sub-s. 1 (*b*) or 1 (*c*) (i.), the last employer's only answer to the claim is under sub-s. 1 (*c*) (ii.) to shift the responsibility on to the shoulders of some other employer by showing that the workman's disease originated when he was in the employment of that employer and not in his own. If he fails to show so much, or if the other employer had not employed the man within the twelve months, the last employer's liability under the section to make compensation remains unrelieved, although he is himself free from all responsibility for the so-called "accident" on the hypothesis of sub-s. 1 (*c*) (ii.) itself.

This instance is alone sufficient to dispose of the supposed correspondence in this respect between s. 8 and s. 1 of the Act which *Dean's* case (1) purported to confirm. But such an instance is confined to diseases definite in origin. Is the position different as regards diseases contracted by gradual process? In no way, as I think. There, however, the result is reached by a different process of reasoning.

And first, my Lords, it follows from a very simple consideration. The workman who has to prove that his disease was "due to the nature of" some employment in which he was engaged, may of course be a workman suffering from a disease contracted by gradual process as frequently as from a disease of sudden onset, and what he has to prove is in terms the same in each case. But in the one class of case there can, as has been seen, be no question of the applicant being under any obligation to make against the "last employer" what would then be the entirely inappropriate case outlined by the Master of the Rolls. Why, under the same words, should such an obligation be implied in the other class of case?

But again, my Lords, while in this second class of cases, as in the first, the last employer is the only person from whom the compensation is recoverable, he may, in a case of gradual process under s. 8, sub-s. 1 (*c*) (iii.), obtain contribution

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from any other employers who, during the twelve months, employed the workman "in the employment to the nature of which the disease was due." Now, my Lords, it has not been suggested that under this sub-section there is any obligation on the part of the employer seeking contribution to make against the employers against whom it is sought any such case as is outlined by the Master of the Rolls in the passage already quoted; and that there is no such obligation has been held, and I think rightly held, by the Court of Appeal in *Mallinder* v. *Moores & Sons.* (1) That is to say, in a question of contribution the section takes no concern with the fact or time of contraction of disease; it takes no heed of aggravation in the service of one employer or of another. But if that be so, why, under identical words, should there be imposed upon the claimant as against the last employer an obligation which is not in turn and by the same words imposed upon that employer in a question with contributors to his liability? And the difficulty of finding any other than a negative answer to this question is enhanced by the fact, so often already insisted upon and clear on the section, that while in the case of these diseases all the employers within the year are as between themselves under a corresponding liability to contribute to the compensation awarded, it is only as against the last employer that the claimant can, in any case, proceed. If he fails against him, he fails entirely.

Whether, therefore, the disease in question be of the first class or of the second it appears to me to be clear that a claimant is under no obligation to prove more than in the present case the appellant proved. His claim to compensation is thereby established.

My Lords, the result, it may be admitted, is arbitrary. But it becomes inevitable, so soon as it is seen that merely by the accidental circumstance that the disabled workman had, more than twelve months before, left the employment of the employer in whose business his disease originated, a later employer may be made, without recourse, responsible for the entire consequences. Although, however, the result

(1) [1912] 2 K. B. 124.

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is arbitrary, it cuts both ways. If in this case the respondents are made liable, although they are not shown to have been directly responsible for the appellant's disablement, in another case they may be free of all liability even if the claimant's disease, it may be a disease definite in origin, was contracted in their own works.

And this leads me to my final observation, one which has struck me throughout this case as highly pertinent, although I must confess my inability to persuade Mr. Dale, who argued the appellant's case so ably, that it helped him at all.

My Lords, I see in sub-ss. 7, 8 and 9 the strongest confirmation of the view as to the effect of this section which, apart altogether from these sub-sections, I have already expressed. As is well known, a workman has under this Act a very exceptional interest in insurances entered into by his employer in respect of liabilities under the Act—see s. 5—and in these sub-sections I find machinery provided for bringing into existence by provisional order in respect of employers' liability under this s. 8 a *compulsory* system of *mutual* insurance throughout an industry at risk under it. I can myself find no explanation for the element of compulsion, peculiar to this section, being introduced into this mutual insurance, and at the instance of any employer or workman engaged in the industry, except this, that the Legislature, impressed by the arbitrary and it may sometimes be heavy liability imposed as a result of the section's scheme of compensation, was careful to provide some machinery under which the risk might, at the least expense and over all employers subject to it, be as fairly and accurately averaged as is possible under a scheme of mutual insurance sanctioned by Parliament.

On the whole matter, my Lords, I am of opinion that the case of *Dean* (1) proceeds upon a wrong principle, and I think it should be definitely overruled. With the rest of your Lordships I am for allowing this appeal.

Order of the Court of Appeal reversed, and cause remitted back to the judge of the County Court

(1) [1914] 2 K. B. 213.

of Devonshire, holden at Newton Abbot, with a direction to find the amount of compensation due to the appellant and if necessary to deal with any claims against any other employer, which may be substantiated, by the respondents and to do therein as shall be just and consistent with this judgment. The respondents to pay to the appellant the costs in the Courts below and also the costs in respect of the appeal to this House.

Lords' Journals, April 4, 1927.

Solicitors for appellant: *H. S. Sims & Co., for Alfred Riley & Son, Blackburn.*

Solicitors for respondents: *Arnold Carter, for Dunn & Baker, Exeter.*

[HOUSE OF LORDS.]

LAKE . . . . . APPELLANT;

AND

SIMMONS . . . . . RESPONDENT.

H. L. (E.) * 1927 *April* 4.

Insurance—Lloyd's Goldsmiths' Association Policy—Exceptions—"Theft by customer"—"Goods entrusted to customer"—Larceny by a Trick—Absence of Owner's Consent to Possession.

The plaintiff, a jeweller, was insured under a Lloyd's policy against loss or damage to jewels by (inter alia) theft. The policy contained a clause exempting the insurers from liability in the case of "loss by theft or dishonesty committed by . . . . any customer or broker or broker's customer in respect of goods entrusted to them by the assured." A woman E. E., who had previously bought some articles at the plaintiff's shop, induced the plaintiff to let her have possession of two pearl necklets by fraudulently representing that she was the wife of a certain person and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval with a

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, and LORD BLANESBURGH.

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view to purchase by them. E. E. disposed of the necklets for her own benefit. In an action on the policy to recover the value of the necklets the insurers pleaded the exemption clause. The trial judge found that E. E.'s conduct was fraudulent throughout, and held that she was guilty of larceny by a trick, and the Court of Appeal and the House of Lords accepted these conclusions:—

Held, first, that the plaintiff had not entrusted the necklets to E. E., because there was no real consent by him to her obtaining possession of them, and, secondly, that quoad the particular goods, E. E. was not a customer within the meaning of the clause.

Decision of the Court of Appeal [1926] 2 K. B. 51 reversed and decision of McCardie J. [1926] 1 K. B. 366 restored.

APPEAL from an order of the Court of Appeal (1) reversing by a majority (Bankes and Warrington L.JJ.; Atkin L.J. dissenting) a judgment of McCardie J. (2) in favour of the plaintiff (the appellant) in an action on a Lloyd's policy for the recovery of the value of two pearl necklets lost during the currency of the policy.

The facts are stated in the report of the case before the Court of Appeal and in the opinion of Viscount Haldane.

1927. Feb. 1, 3, 4, 10, 11. *Jowitt K.C.* and *J. B. Melville* for the appellant. The question is whether the loss of these necklets by the theft of Esmé Ellison was a loss by theft or dishonesty committed by a customer in respect of goods entrusted to that customer by the assured within the meaning of the first exception in the policy. This really involves two questions: (1.) Was Esmé Ellison a customer? and (2.) Were the goods entrusted to her?

As to 1: "Customer" in this collocation means a customer in respect of the goods entrusted, otherwise no meaning is given to the words "in respect of, etc." The exception does not apply unless the goods are entrusted to a customer qua customer. This at any rate is a possible and reasonable construction, and the fact that the exception is capable of a wider construction will not avail the underwriters, for they cannot rely upon an ambiguous exception: *Elderslie Steamship Co.* v. *Borthwick.* (3) A customer may be roughly

(1) [1926] 2 K. B. 51. (2) [1926] 1 K. B. 366.
(3) [1905] A. C. 93.

defined as a person who becomes under some liability to pay —either a buyer or a prospective buyer; but Esmé Ellison was under no liability whatever in respect of the prices of the necklets. Therefore, quoad the transactions in question she was not a customer.

As to 2: Entrusting involves consent to the recipient acquiring possession of the goods. If the nominal consent is obtained by means of a trick it is in the eye of the law no consent at all and the acquisition of the possession is a theft. The trick destroys the reality of the consent, and if there is no consent there is no entrusting: Pollock and Wright on Possession in the Common Law, p. 218; *Cundy* v. *Lindsay* (1); *Cole* v. *North Western Bank* (2); *Kingsford* v. *Merry* (3); *Hardman* v. *Booth* (4); *Phillips* v. *Huth* (5); *Cahn and Mayer* v. *Pockett's Bristol Channel Steam Packet Co.* (6); *Oppenheimer* v. *Frazer and Wyatt* (7); *Mehta* v. *Sutton.* (8) All the judges in the Courts below are agreed that the offence of Esmé Ellison was larceny by a trick. She represented that she was the wife of Van der Borgh, which was a lie, and as regards the second necklet she represented that Commander Digby was a wealthy man, whereas there was no such person, and if the appellant had known the truth he would not have handed over the necklets to her. The distinction between larceny by a trick and obtaining money by false pretences depends on the question whether, when the physical possession was handed over, there was or was not an intention to pass the property. Here this woman was a mere messenger; she had no right of property in the necklets and no authority to pass any property in them or to conclude any bargain at all. If this were a case of false pretences or of theft by a bailee then, no doubt, there might have been an entrusting, but it was neither. There can be no bailment when the person handing over possession does not know what he is doing. In

(1) (1878) 3 App. Cas. 459.
(2) (1875) L. R. 10 C. P. 354, 373.
(3) (1856) 1 H. & N. 503.
(4) (1863) 1 H. & C. 803.
(5) (1840) 6 M. & W. 572.
(6) [1899] 1 Q. B. 643.
(7) [1907] 2 K. B. 50.
(8) (1913) 29 Times L. R. 185.

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Whitehorn Brothers v. *Davison* (1) the Court, upon a somewhat narrow view of the facts, took the view that the case was not one of larceny by a trick, but Lord Wrenbury there defines larceny by a trick in a way which absolutely covers this case. He says, "there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing." He then discusses the offence of obtaining goods by false pretences and comes to the conclusion that where the owner either intends to pass the property or intends to confer a power to pass the property, that is a case of obtaining goods by false pretences. This qualification does not affect the appellant's case, for Esmé Ellison had no disposing power at all. In *Folkes* v. *King* (2) the Court of Appeal held on the facts that the offence in that case was not larceny by a trick, but two of the Lords Justices went on to say that, even in a case of larceny by a trick, there might be a consent to the possession, though they admit that there can be no consent if there is a mistake as to identity. These opinions appear to be inconsistent with *Oppenheimer* v. *Frazer and Wyatt* (3), as Atkin L.J. points out in his dissentient judgment, but they do not hurt the appellant, because there was here a mistake as to identity. *Folkes* v. *King* (2) was distinguished in *Heap* v. *Motorists' Advisory Agency* (4), where it was held that, the case being one of larceny by a trick, there was no consent to the possession. In *Lowther* v. *Harris* (5) the decision was that the goods were obtained by false pretences, but Wright J. expresses a doubt what, if it had been a case of larceny by a trick, the result would have been, having regard to the conflicting decisions in

(1) [1911] 1 K. B. 463, 479.
(2) [1923] 1 K. B. 282.
(3) [1907] 2 K. B. 50.
(4) [1923] 1 K. B. 577.
(5) [1927] 1 K. B. 393.

Oppenheimer v. *Frazer and Wyatt* (1) and *Folkes* v. *King*. (2) Upon the question of entrusting the appellant relies upon the reasoning of Atkin L.J.

[The following cases were also referred to: *Rex* v. *Devonport* (3); *Moore* v. *Evans*. (4)]

Sir John Simon K.C. and *Van den Berg* for the respondent. This is a commercial contract between the underwriters and the assured, and to ascertain its meaning the first thing to do is to examine the nature of the document without regard to the niceties of the criminal law. It is an insurance of jewellers' goods against loss from various causes, including theft, and it is a policy in which there is a division of responsibility for loss. In the main body of the contract the underwriters undertake responsibility for the loss of the goods while they are in the custody of the assured or in the custody of any person to whom he may have entrusted the same "on the conditions of sale or return, for valuation, or inspection, or for any other purpose whatever." But the policy contains certain exceptions. The underwriters decline to undertake responsibility for any loss by theft or dishonesty committed (1.) by any whole time servant or traveller of the assured; (2.) "by any customer or broker or broker's customer in respect of goods entrusted to them by the assured." The first limb of the exception is co-extensive with the area of the policy. The assured is to remain liable for the theft or dishonesty of his servants or travellers, however occurring, and whether the goods are entrusted to them or not; the second limb covers less ground and is limited to the theft or dishonesty of a customer or broker or broker's customer when the goods are entrusted to him. Two questions arise on this policy: (1.) Was this a loss by the dishonesty of any customer? and (2.) Was it in respect of goods entrusted to him? Looking at the whole scheme of the policy, first, the word "entrusted" in the body of the policy, having regard to the words which follow it, must have the widest

(1) [1907] 2 K. B. 50.
(2) [1923] 1 K. B. 282.
(3) (1826) M. S. Archbold's Peel's Acts, 2nd ed., p. 5.
(4) [1918] A. C. 185.

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possible meaning and must include any voluntary handing over for a purpose, and, according to a well recognized rule of construction, that word should have the same meaning in the exception. Secondly, the words in the exception "in respect of goods entrusted, etc." do not qualify "customer" but qualify "loss by theft or dishonesty."

1. A customer is a person who frequents the shop for the purpose of doing business. The word "customer" is not a term of art and is not narrowed by the test of whom you would sue for the price if you issued a writ. If the jeweller was asked for a list of his customers he would include this woman. She would be treated as a customer without regard to the question whether in the particular transaction she was a principal or not. The point is that the jeweller thinks she is a person whom he may safely trust and is prepared to take the risk of his confidence being mistaken. In the respondent's submission this woman was a customer not only in past transactions but in the transactions in question. This was the unanimous view of the Court of Appeal.

2. As to entrusting, whatever may be the accurate statement of the law in regard to convictions of crime, it is a strained and artificial reading of this commercial document to treat the language there used as having any reference to distinctions of that kind and to say that the liability of the underwriters depends on the question at what moment of time the customer was tempted to be dishonest. In a prosecution for theft it is essential to prove that possession was acquired invito domino, and the reason for the rule with regard to larceny by a trick is to furnish an answer to the defence that the dominus was not invitus, because he gave the thing to the defendant. That is a perfectly intelligible and logical view of the particular proceeding between the prosecutor and the defendant, because it is really applying the principle that no one can take advantage of his own fraud, but that has nothing to do with the question whether there has been an entrusting or not. The policy deals with the case where goods which are in the custody of the jeweller pass into the custody of somebody else, and it is only because the goods

have passed from the jeweller's custody into the custody of somebody else that the entrusting arises.

The goods insured are defined as being goods which are either in the custody of the jeweller or are entrusted to somebody else, and, if they are not in the custody of the jeweller and are not entrusted to somebody else, they are not covered by the policy. Voluntary delivery of possession by the owner is necessarily an entrusting and gives to the recipient rights that follow from possession, e.g., the right to recover the full value in trover. Whether the crime of Esmé Ellison was larceny by a trick or obtaining money by false pretences it is not true to say that there was not, within the meaning of this policy, a voluntary passing over of the custody of these goods. But, first, the crime was not larceny by a trick. In *Whitehorn Brothers* v. *Davison* (1) Buckley C.J. was of opinion that if the owner intended either to pass the property or to confer a power to pass the property the crime was not larceny by a trick, but false pretences, and Vaughan Williams L.J. was of the same opinion. It is not suggested here that the woman herself had the property, but it is submitted that she had authority to pass the property in certain events to a customer.

But, secondly, assume that the offence was larceny by a trick, it does not necessarily follow that in commercial transactions the consent of the owner is annulled by the fraud. It is the nature of the trick and not the fact that it does or does not amount to larceny which governs the question. Larceny by a trick may be committed in two ways. There may be a misrepresentation as to the identity of the person or of the goods. In these cases the owner does not intend to part with possession to the thief. But, secondly, there may be larceny by a trick where the owner intentionally parts with possession of the goods to the thief, being induced to do so by a fraudulent misrepresentation not affecting the identity of the thief or of the goods, and in this class of case the owner in fact consents to the possession of the

(1) [1911] 1 K. B. 463.

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goods by the thief and that consent is not annulled by the fact that it was obtained by fraud. That is the effect of *Folkes* v. *King* (1), upon which the majority of the Court of Appeal based their judgment in the present case, and in a sense this case may be regarded as an appeal from that decision. Applying that decision to the facts of the present case, this is that kind of larceny by a trick which does not depend on the absence of consent as regards either the person or the goods, and, there being an agreement between the parties on those points, that is all that is required for the purpose of entrusting. In determining whether the jeweller entrusted these goods to this woman it is the mind of the jeweller which has to be ascertained, and it is immaterial to inquire what was the wicked motive of the recipient. Here the jeweller did voluntarily pass possession of the goods to this woman. No mistake as to identity arises from the mere fact that the woman wrongly described herself as the wife of Van der Borgh: *Phillips* v. *Brooks*. (2) A mistake as to capacity or status is not a mistake as to identity. Although the jeweller would not have allowed the goods to be taken out of the shop if he had known the truth about this woman, that does not alter the fact that he did agree with the woman in the shop that the woman in the shop should have the custody of the goods. The result is that there was here an entrusting of the goods to a customer within the meaning of this policy.

Jowitt K.C. in reply referred to Holmes on the Common Law, p. 308, and Pollock on Contracts, 9th ed., p. 509.

The House took time for consideration.

1927. April 4. VISCOUNT HALDANE. My Lords, in this case there is no dispute as to the facts. What has happened is that two of the learned judges of the Court of Appeal have taken a different view of the interpretation to be put on them from that taken by Atkin L.J., who dissented, and that taken by McCardie J., who tried the case.

(1) [1923] 1 K. B. 282. (2) [1919] 2 K. B. 243.

The narrative of events is briefly this. The appellant, who claims as plaintiff on a policy of insurance, is a jeweller at Exeter who became insured in 1922 by a Lloyd's policy underwritten, among others, by the respondent, to cover risks up to a total of 16,000*l.* for twelve months. The property so insured consisted of the appellant's stock-in-trade, and it included precious stones, pearls, and all other articles usually kept in stock by jewellers. What was insured extended not only to the property of the appellant, who was described in the policy by the name of his firm, but to what he held in trust or commission, or was held by him as responsible while in his own custody, "or in the custody of any person to whom" he might "have entrusted the same in the conditions of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The perils insured against were loss or damage or misfortune to any of the property arising from any cause, with the exception, set out specially in the policy, of such as are (inter alia) not mentioned. These exceptions extend to "loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the Post), or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured, his servants or agents," unless such loss "arise, when the goods are deposited for safe custody by the assured, his servants or agents, with such broker or customer or broker's customer."

The claim of the appellant under this policy was for the value of two pearl necklets (valued at 750*l.* and 700*l.* respectively) lost during the currency of the policy. The circumstances in which the claim arose are as follows: The claim was made by the appellant against the respondent, representing a number of insurers, by reason of the fraudulent conduct of a woman named Esmé Ellison, who was convicted, on October 2, 1923, at the quarter sessions of the city of Exeter, of theft of the necklets, the subject of the claim in this action, and was sentenced to hard labour for sixteen months. She was a practised criminal, who had been

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previously convicted of larceny and false pretences, and had spent substantial periods in prison.

In the early part of 1923 Esmé Ellison was living with a Mr. Van der Borgh, who probably knew nothing of her past, as his wife, which she was not, at Stonelands, a well known residence near Dawlish, not very far from Exeter. On March 2, 1923, she called at the appellant's shop in Exeter, and saw his manager. She said that she was living with her husband at Stonelands, and mentioned that her sister had just become engaged to a Commander Digby. She bought a ring for 30*l.* This sum was debited to her personally, as Mrs. Van der Borgh, and she paid it on March 6 by cheque on a local bank with which she had opened an account. On the same date she bought from the appellant a pair of old Sheffield dishes for 16*l.* 16*s.*, which were duly debited to her personally as before, and she paid the price on March 16 by a cheque on the same account. On March 6 she also bought a diamond ring for 28*l.* 10*s.*, which was again debited to her personally as Mrs. Van der Borgh, and for which she paid by cheque on April 4. In some of these transactions the appellant personally dealt with Esmé Ellison.

When she made her visit to the appellant's shop on March 6, she saw the appellant and told him that her husband intended to give her as a birthday present a pearl necklet of the value of 1000*l.*, and she asked the appellant to produce some necklets for her inspection. After he had sent for and got them she saw them at the shop. She told him that a relative, who she said was staying at Stonelands, wished to give a wedding present to one of her sisters who had become engaged. On March 16, at an interview with the appellant, she looked at two necklets which he showed her, and asked him to permit her to take them to Stonelands in order that her husband, who was temporarily absent, might look at them. This the appellant let her do. He made an entry in his books which is: "P. F. Van der Borgh, Stonelands, Dawlish. (1.) A fine pearl necklet of 121 pearls, 1100*l.*; (2.) A fine pearl necklet of 139 pearls, 1000*l.* On appro." The learned judge who tried the case and the Court

of Appeal agreed in thinking that Esmé Ellison was under these circumstances a "customer" within the meaning of the policy. No doubt on the earlier occasions she was so, but that does not conclude the question as to the relationship in the transactions to which I now come.

What was the precise nature of the transaction between the appellant and Esmé Ellison in regard to the two pearl necklets? As already stated it took place on March 16, 1923. The appellant made an entry in his books, not in her favour but in that of P. Van der Borgh, her supposed husband, as the purchaser, on approbation. He let her take both necklets away to show to him. On March 21 she paid a further visit to the shop. She bought one of the necklets, saying that her husband was pleased with the other and had selected it, but that Commander Digby, who, she had said, was engaged to her sister, admired the one she brought back, but would not be able to pay the whole price at once. On March 28 she made yet another visit to the shop and stated that Commander Digby continued to admire the necklace she had brought back, and that she wished to take it back to show to him again. On April 4 she called again and the appellant let her take it away for this purpose. He entered in his books, "Lt.-Commander Digby, Cadistock, Dorset, a fine pearl necklet (129 pearls), 1000*l.* on appro." There was no such person as Commander Digby, nor had Esmé Ellison a sister. Van der Borgh knew nothing of the transactions about the necklets. She herself made away with both of them. She disposed of them and neither has been recovered.

The learned judge who tried the case found the facts as I have stated them, and he also found that Esmé Ellison's conduct was fraudulent throughout; that the small preliminary purchases in her own name were part of a design to gain the confidence of the appellant; that at the time she gained possession of each necklet she intended to steal it; that the only purpose for which the appellant gave her possession was, that she might hand the one to Van der Borgh for his inspection and the other to the fictitious Commander

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Digby for a similar purpose; that she received the necklets for limited and specific purposes only; that the appellant intended that his purchaser and debtor should be Van der Borgh in the one case and Digby in the other, and not Esmé Ellison. In these findings of fact the Court of Appeal concurred. Both Courts held that as the result she was guilty of larceny by a trick.

My Lords, so far I have no doubt that this was a true conclusion. If that were all the case would come within the initial and operative words of the policy, which insures against the risk of theft. It would also come within the words which follow descriptive of the property insured, for these expressly mention property for which the insured is responsible if it is in the custody of any person to whom the insured has entrusted it on the condition of sale or return, for valuation or inspection, or for any other purpose whatsoever. But there is in this policy the exception to which I have already referred in quoting the language of the policy. It is exception 1, which excepts from the insurance loss by theft or dishonesty committed by (inter alios) "any customer or broker or broker's customer in respect of goods entrusted to them" by the insured, unless the loss arises when the goods are deposited for safe custody.

It is contended for the respondent that what has been established in point of fact amounts to an entrusting obtained by false pretences of the property, as distinguished from an obtaining by larceny by a trick or theft. What we have to determine is thus a question on the construction of the exception. Was the case simply one where there was no real consent to any property or such possession being taken over by the woman, and in that sense theft in contemplation of law? Or was it a merely voidable as distinguished from a void transaction, in which a delivery, which was intended to pass the possession and a limited proprietary title in the nature of a bailment, was brought about by a false representation, so that it would stand if the seller did not disaffirm it? That this question is a difficult one is obvious, for the

judges in the Courts below have been evenly divided about it. We have had it fully argued at the Bar.

My Lords, in the speeches of counsel on the appeal a mass of authorities was cited and relied on. I have thought it my duty to read them through. I cannot say that I have derived much new light from the study. Some of the cases cited lay down principles of law which are general and clear. About these principles there is, however, no real controversy. Others relate to the application of principles to circumstances which are not the same as those in the case before us. They help, in truth, but little. What is important for our purpose is to get before our minds the particular concrete questions before considering the law to be applied.

Now the first of the questions is partly, at least, one of mixed fact and law, the interpretation to be placed on the application of the word "entrusted" in the exceptions. "Entrusted" is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over the possession of some purpose which may not imply the conferring of any proprietary right at all. I hand my umbrella to a servant to enable me to be free of it while I am taking off my coat. In a very general sense I entrust him with the umbrella. But there is no easily definable bailment in such an instance. What I have really done is to divest myself of the embarrassing circumstance of holding it. Entrusting may, of course, introduce a bailment, conferring some definite but restricted proprietary right. It is a question, then, of the contract entered into. And whether there is such a contract depends on more than a bare parting with possession. To entrust to a customer or broker or "broker's customer," as specified in the exception, means a definite contract. The reference to "safe custody" as a purpose outside the exception points to this. So does the reference to a broker or a broker's customer. But in the general clause at the beginning of the policy, where the entrusting may be for any purpose whatsoever, the word is surely used in a more general sense, to cover all cases in which the article

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has been deliberately put into the possession of some other person.

Now it may well be that in this more general sense the appellant entrusted Esmé Ellison with the possession of the necklets. She may well have been his customer on other occasions. But on this particular occasion it is plain from his evidence and from his books that he did not look on her, but only on Mr. Van der Borgh and the supposed Commander Digby, as the possible purchasing customers.

Esmé Ellison was a mere intermediary, little more than a porter, so far as any contract was concerned, a person entrusted with the possession for purposes which seem to fall short of all of those specified in the exception. She certainly got no property. Having regard to the circumstances that in contemplation of law she stole the necklets from the appellant, it is only in a qualified sense that she got even the possession. No doubt she got possession physically, but there was no mutual assent to any contract which would give her even the qualified proprietary right to hold it as a bailee proper. The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. It was only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all. In circumstances such as these, I think that there was no such consensus ad idem as, for example, Lord Cairns, in his judgment in *Cundy* v. *Lindsay* (1), declared to be requisite for the constitution of a contract. No doubt physically the woman entered the shop and pretended to bargain in a particular capacity, but only on the footing of being a different person from what she really was. There was never

(1) 3 App. Cas. 459.

any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller.

Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a de facto physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (Traité des Obligations, section 19) lays down the principle thus, in a passage adopted by Fry J. in *Smith* v. *Wheatcroft* (1): "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." In the careful judgment delivered by him in *Phillips* v. *Brooks* (2) Horridge J. decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and looked at and selected certain jewels which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer, who drew a cheque pretending to be some one else, and signing it in a well known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. Horridge J.

(1) (1878) 9 Ch. D. 223, 230.

(2) [1919] 2 K. B. 243.

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found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Mr. Justice Holmes says at the beginning of the Ninth lecture in his book on The Common Law, no contract, because there is really only one party.

This being so I think that on the facts found there ought to be judgment for the appellant. No doubt if there was a bailment such as alleged by the respondent, and it is merely voidable, as where the handing over merely follows on a further false representation which leaves an initial contract intact, a determinable right of property of some kind may pass sufficient to enable a title to be made by the bailee to some one who takes under proper circumstances without notice. But it is otherwise when the bailment is void ab initio, as in case of mere theft. I am unable to see how the relation of entrusting to a customer within the meaning of the exceptions can arise here. Bankes and Warrington L.JJ. came to the conclusion that there was in this case an entrusting to a customer within the words of the exception. I find myself more in agreement with the other view taken by Atkin L.J. and by McCardie J. at the trial. I go rather further than the learned Lords Justices went in their interpretation of the facts. For to me it appears that on the occasion we are dealing with the jeweller was not dealing with this woman as a customer. We have to remember that what he did was to let her have possession in her alleged capacity as the wife of a husband who was to inspect and possibly approve. Nothing short of a belief in her identity as a wife who was transacting for her husband as the real

customer would have induced the appellant to act as he did.

My Lords, I do not rely on any doctrine belonging to criminal as distinguished from civil law. The only relevance of the criminal law is, I think, the analysis of the elements required to establish a consenting mind in a general sense. On the broader ground stated I am of opinion that on the facts before us the judgments of McCardie J. and Atkin L.J. were right, and those of the majority of the Court of Appeal wrong. If so the appeal must be allowed with costs here and also in the Courts below.

VISCOUNT SUMNER. My Lords, the facts which are material here fall under two heads. The first is accurately described by saying that the woman Ellison might have been convicted of larceny by a trick; the second by saying that no actual contract, either of sale or of agency or otherwise, purported to have been made between her and Messrs. Lake & Co. "Larceny by a trick" is a short way of saying that the actual delivery of the necklace to her by Mr. Lake de manu in manum, though it wore the outward appearance of consent on his part, was in that respect illusory, because, owing to the deception which Ellison practised on him, his mind did not go consensually with his physical action. It might have saved some discussion, if the finding of fact had simply been so described, without resorting to the more formal title of the crime which she committed; but in my opinion the result is the same. Whichever description is preferable, I adopt the conclusion of both Courts below. I should have been slow to differ from the learned judge, for, in any case, his finding involved consideration of Mr. Lake's state of mind, and he alone heard his evidence. The conclusion that his state of mind was an appearance of consent produced by the trick and not a real consent induced by fraud is a judicial conclusion from the circumstances proved, from the evidence of the victim as to what was said and done, what he believed, and what he would or would not have done in the absence of that belief, and finally, from the judge's own view of the

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ability of the witness himself to analyse and explain his own mental processes with tolerable exactness. A conclusion from these materials is greatly assisted by seeing him and judging what manner of man he is. It would therefore be rash to set up any opinion of my own against the trial judge's conclusion and I am content to accept it, but I wish to add that, on the evidence, it was doubtless right.

As to what purported to be done the case is clear. The necklaces had been placed in Mr. Lake's hands on approbation under such circumstances that, for the purposes of this case, he was in the same position as if he had actually been the owner. Ellison proposed Van der Borgh and the fictitious Digby as purchasers. She never proposed to be the buyer herself. She never acquired nor was meant to acquire any property from Mr. Lake. He let her take the goods in order that these persons might see them on approval. He gave her no authority to negotiate or to conclude a bargain or to pass property from him to them. If the pearls were approved, if they were kept beyond a reasonable time, if the persons, who were to have the opportunity of approving or of disapproving the pearls offered, dealt with them in a manner inconsistent with such offer, a direct sale by Messrs. Lake & Co. to them would result with an immediate passing of the property from the vendors to them.

My Lords, however otiose it may be to do so in your Lordships' House, I would venture further to say something as to the definite consequences of this finding, since any obscurity on this question is certain to raise doubts on a branch of the law, which is settled beyond dispute and ought not to be disturbed. First, when Ellison took the necklaces from the hand of Mr. Lake, she took them as a thief and with no more consent on his part than if she had picked his pocket. The facts are not that she received them from Mr. Lake honestly and without any trick and afterwards formed a felonious intention to deprive him of them, which intention she proceeded to carry out. If that had been so, her offence would have been that of larceny as a bailee. Such a state of facts would further have been inconsistent with obtaining

the pearls by false pretences, for a felonious mind, only arising after she received the goods from the jeweller, would not constitute criminality at the time of the actual obtaining. The whole argument as to the meaning and effect of the word "entrusted" in the exceptions clause in the policy is at once vitally affected, if the expression "larceny by a trick" is used in anything but its strict, that is its legal, sense.

Again, if Mr. Lake consented to nothing, analogies from the distinction between void and voidable contracts are beside the mark, and equally so are arguments which turn on consensus ad idem as an ingredient in the conclusion of a contract. A voidable contract imports a consent with a right to avoid it. The jeweller must then make an election in order to free himself from the obligation. As it is, there was no contract and nothing to avoid. Enlightenment as to the facts was all that Mr. Lake needed, and, on becoming aware of Ellison's dishonesty, he could forthwith have taken back his pearls provided that he avoided any trespass or use of unjustifiable force in doing so. Again, we need not ask how far Ellison would have enjoyed rights under an assumed or implied bailment, if some stranger had converted the pearls as against her. What is clear is that she herself had no property or title of any kind as against Mr. Lake. A legal expression, not altogether felicitous, attributes to a pawnee what is called a "special property" as against the pawnor's "general property" in a chattel, but as there was no question of pledging these pearls to Ellison or of giving her a lien or security over them, she had no special or any other property in them and her possession was merely that of a thief. We come back again to the larceny by a trick.

Such being the relevancy of this finding, the next step is to consider whether anything can be imputed to Mr. Lake which would be equivalent to his consent, however it may have been obtained.

Your Lordships heard an argument to the effect that Mr. Lake was not deceived as to the identity of Ellison. She was the same person, it is said, whom he had seen before, and, if he continued to deal with her, it must have been

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because he gave credit to her statements, which in itself made his act an "entrusting." I think this immaterial. Such facts may raise difficulties in deciding, whether his frame of mind involved misplaced consent or was consistent with absence of any consent at all, but the conclusion that it was such as would negative the appearance of consent and so remove the difficulty in the way of proving an asportavit, concludes the whole issue. It matters not whether the trick takes the form of claiming falsely to be a particular person, or of claiming falsely to be a different kind of personage than the thief is, or in manipulating the objects which are to be acquired. The trickster is equally a trickster in all. If A. B. passes himself off as C. D. it is an instance of the first class. The confidence trick man, posing as a benevolent millionaire from the United States, is of the second. The man who rings the changes and confuses the barmaid, whom he has asked for change, is of the third. The result in all is absence of consent on the part of the person tricked. Of course animus furandi may be a separate matter and it remains to be proved. If the jury were persuaded that the trick was all a joke they would have to acquit, but that would not set up a true consent on the part of the party hoaxed nor would it establish a bailment. The joker's possession would still be bad for want of any consent.

Let us now examine the structure of this accustomed form of policy. Even in reported cases it figures as in use in 1914 (*Moore* v. *Evans* (1)), and I have no doubt is much older. I offer no observations on its drafting. If it suits the parties, as it obviously does, there are no doubt sound reasons for the shape in which it comes before us. It begins with (*a*) a recital, that a premium has been paid to insure Messrs. Lake against the risks of loss and/or damage by fire, burglary, robbery, theft, accident, from whatsoever cause or misadventure to/of the property herein specified. This is (*b*) certain chattels, including pearls, the property of Messrs. Lake, in trust or on commission or for which the assured is/are held to be responsible, (*c*) while in their own

(1) [1916] 1 K. B. 479.

custody or in the custody of any person, to whom they may have entrusted the same on sale or return for valuation or inspection or for any other purpose whatsoever. (*d*) The loss must have occurred from Messrs. Lake's premises, 43 High Street, Exeter, or while in transit in the United Kingdom. Then follows (*e*) the duration of the policy. Having thus recited the name and premises of the assured, the kind of chattels covered and their relation to the assured, and the place in which they are to be when covered and the period of the insurance, the policy declares as follows, " touching the adventures and perils to the property hereby insured, which we the assurers . . . . do take upon us, they are the loss of and/or damage or misfortune to the before-mentioned property or any part thereof, arising from any cause whatsoever, except as hereinafter mentioned," and then follows the material exception clause No. 1.

Leaving out words not material for present purposes, I think that as a matter of construction the exception clause takes out of the stipulated cover against " thefts " generally, certain thefts conditioned in accordance with its terms, and these fall into two classes—namely, those committed by employees of the assured under all circumstances, and those committed by customers, brokers, or brokers' customers, when, but only when, the words " in respect of goods entrusted to them by the assured " are satisfied.

Now that must mean the same theft or thefts as in the recitals which define the extent of the insurance, and, though not so peculiarly a term of art as larceny, theft in each case must mean anything that the law would regard and punish as theft in the fullest sense of the word. Next, the part of the clause, under which a quality of the excluded theft is indicated by the words " by any customer . . . . in respect of goods entrusted," must cut out something already included by the general recitals and provisions. When the goods have passed out of the assured's own custody, they are not covered unless they have been " entrusted " to others on sale or return, for valuation or inspection, or for any other like purpose under the ejusdem generis rule of construction. " Entrusted "

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has therefore the same sense in the exception as in the general words, and the only material "entrusting" is an entrusting (*a*) by the assured, (*b*) for one of the specified purposes. I think it follows that "entrusting" in the exception cannot mean a bare handing over or physical delivery. It does not extend beyond such a delivery as satisfies the two qualifications stated. The goods must have been handed over in a way that can be described as "entrusting" and for one of the named purposes, which in this case can be no other than "on the conditions of sale or return." Here it is quite plain that the pearls were never entrusted to Ellison on conditions of sale or return. She was not the person who was to approve or to buy or return them—that was Mr. Van der Borgh or Commander Digby. If there was entrusting, it was to one of them. One of these persons was imaginary. The other was not a customer and he was not, in fact, aware of what was being done or concerned in it in any way. In fact, nobody was entrusted.

In the next place, Mr. Lake, who trusted Ellison in the sense of believing what she said, who entrusted the pearls to her, if at all, only that she might take them to Van der Borgh or Digby for purchase or return by them, and who did what was done under a complete delusion, can only be said to have "entrusted" the pearls to her, if he consented to her having them. If there was a trick, which prevented any true consent arising, there could be no entrusting. The terms are mutually exclusive. In my opinion, the natural meaning of "entrusted" involves that the assured should by some real and conscious volition have imposed on the person, to whom he delivers the goods, some species of fiduciary duty. There is no room here for any colloquial sense. A large and important part is played in a jeweller's business by the various kinds of genuine "entrusting," which the earlier part of the policy describes. The exclusion from the risk covered of any delivery of possession, however devoid of mental assent on the part of the person who gives it, would be quite arbitrary and hard to reconcile with the general insuring words. The language is the insurers' own, and in

an exception it must be read contra proferentes. If they intended no more than "handed over," they should have said so, and the more plainly the better.

Against this conclusion reliance has been placed on two arguments, (*a*) that in a commercial document no legal technicality of the criminal law should be taken into account, and (*b*) that the element of consent should be taken in the sense in which, in the Factors Act, 1889, s. 2, the Court of Appeal was disposed to read it in *Folkes* v. *King*. (1)

Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure. This, however, is not a case in which the appellants propose to read the policy as if they were arguing an old-fashioned indictment, nor do I think it fair to discuss their contention as if it involved "technicalities of the criminal law." Even if it were the case that the occasion, on which the doctrine of larceny by a trick at common law was first developed, was one, in which a thief would otherwise have escaped conviction, where he had called in fraud to the assistance of his nimble fingers, the doctrine is now statutory under the Larceny Act, but I do not think the doctrine ever was one, which could be described as being an artificial view of the facts as opposed to the actual facts of the case. It was not merely "invented by judges" to prevent a thief from taking advantage of his own wrong and relying upon a possession which he obtained unlawfully. Before this "invention" an accused person, who contended that there was no sufficient evidence of a taking, was not relying on a possession unlawfully obtained; he was relying on the law and was taking proper advantage—if that is the word—of being in the right at any rate as to the law of evidence. I dissent from the view that criminal law should be treated as irrelevant merely because a document is commercial. After all, criminal law is still law and so are its definitions and rules. Besides, the distinction between a real consent, obtained by deceit, and

(1) [1923] 1 K. B. 282.

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an unreal consent, extracted by a trick, is equally applicable to civil disputes. As Mr. Justice Story says (Equity Jurisprudence, s. 222): "consent is an act of reason accompanied with deliberation . . . . Grotius has added that what is not done with a deliberate mind does not come under the class of perfect obligation, and hence it is true, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

On the bearing, which apparent consent, obtained by a trick, may have on the "consent," which is mentioned in s. 2 of the Factors Act, 1889, there has been so signal and so indecisive a conflict of authoritative opinion, that I should be loath to offer any conclusion of my own, unless it was quite clear that the point was necessary to the decision of this case. I think it is not. The fact that it is the word "entrusted" that is before us and not the word "consent" is a minor matter, but the nature of the document under construction is crucial. By the present policy the underwriters stand behind Messrs. Lake and hold them harmless, if certain events happen to their detriment, specifying those events in their own words first by a general inclusive statement and then by a particular exclusion thereout. The questions of larceny by a trick and of false pretences do not arise under the words "theft or dishonesty." The relevance of larceny by a trick is to test, whether the customer, whose dishonest act is in issue, is a customer "entrusted." The word clearly connotes a definite state of mind. Whose mind? Only that of the assured. It is he who entrusts, if entrusting there be; no third party other than the thief enters into the case and it is the jeweller's state of mind that matters on the issue "consent or no consent," while the thief's state of mind and not the jeweller's is relevant to loss by theft or dishonesty. Further, this contract is made for the protection of the assured and of nobody else. The Factors Act, on the other hand, was framed for the benefit and protection of third persons, into whose hands commercial documents of title have passed

for value and in good faith on their part. The action which prejudices them is action which only becomes possible because an unauthorized person has got the documents under circumstances that lead others to act in the belief that the true owner has given his consent. An argument may well arise in such circumstances that, as against the third party who has changed his position, the original owner cannot deny a consent which is not only apparent but is invested with this appearance by what he has done. What they have to be protected against is not confined to the results of his intelligent and consensual action but against the results of any action on his part at all. Be this as it may, it seems to me not to be decisive in the present case and I say no more upon it.

I agree that Ellison was not a customer for the purpose of the exceptions clause. There is no point in introducing a person, who is by trade a broker and still less his customers too, who may be unknown to the assured, unless that capacity is directly connected with the goods with which the exception deals. Accordingly, my Lords, I think that the appeal succeeds.

Lord Atkinson. My Lords, the argument in this case has ranged over a very wide field. My noble friends who have preceded me have dealt with the various points which have been argued by counsel on both sides. I do not propose to deal with those points again. I think the appeal succeeds. I think Miss Esmé Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which, prima facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted

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first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her, furnished to her—as she intended it should—the opportunity for and means of committing the theft.

It does not appear to me to be possible to separate the handing over of the possession of the jewels from the falsehood which preceded it, and the felonious action which followed it. The entrusting of goods to a customer mentioned in the exception cannot mean the delivery in all good faith by a dealer of goods to a customer which that customer has planned to steal, and by that very delivery enabling the customer to effect her felonious purpose. The true character of the operation was larceny of the appellant's goods by means of a trick—the trick being the false and fraudulent representation which this woman made to the appellant, by which the delivery to her of the possession of the jewels was obtained.

The appellant had no suspicion, apparently, that he was about to be robbed through the medium of this trick. He acted perfectly honestly in giving over the possession of the jewellery. So does every one, presumably, who suffers from larceny by a trick. It is the honest belief of the person robbed in the false statements made which enables the intending thief to defraud him. That, however, does not alter the real character of the entire transaction.

Again, the inclination of my opinion is that Miss Esmé Ellison was not a customer of the appellant quoad the goods, the possession of which was handed over to her, within the meaning of the exception, though she may have stood to the appellant in relation of customer in other transactions. No doubt the appellant regarded the handing over of the jewels to her as ancillary to a possible sale of them to her pretended husband, but the idea of having any dealing of that kind with the appellant in reference to this jewellery never entered her head. From the first she apparently

designed and intended a theft. That was the nature of the only dealing she had in mind. As I have said, I think the appeal succeeds.

LORD WRENBURY. My Lords, I concur.

LORD BLANESBURGH. My Lords, I think also that this appeal succeeds, and while I entirely agree with the judgment of my noble and learned friend Lord Sumner, which I have had the advantage of reading, I propose specifically to base my conclusion on the simple ground that Ellison was not in either transaction a customer of the appellant within the meaning of the exception clause of the policy.

I do not doubt that by the month of March, 1923, she had resorted to the appellant's shop for the purpose of purchasing goods from him with sufficient frequency to justify her inclusion in the class of persons aptly enough described as the customers of the appellant in connection with his business of a jeweller. I am free also to agree that if the only customers or persons referred to in the exception clause had been customers of the assured, it might on construction have been difficult to avoid the conclusion that nothing more was required to bring Ellison in this respect within the exception. With reference to a clause so framed it could with force have been urged that his customers were so excepted because the assured had no need to be protected against the unlikely dishonesty of people he knew and trusted in business.

But, my Lords, the exception is not confined to customers of the assured. It extends to a "broker or broker's customer" as well, and, as will be seen in a moment, no corresponding explanation of their appearance in the exception can be put forward.

If the whole expression is to be construed in absolute or detached terms, as I have so far construed the word "customer," who, it may be asked, is a "broker"? May he be any kind of broker? What is the qualification for his inclusion if he may not? What possible connection, still construing the word at large, is there between the assured and the "customer" of such a broker? Who is such a

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"customer"? Who is not? How would that position, one way or the other, be known to the assured? It is, my Lords, I think, quite impossible to say. In my judgment, therefore, it is necessary to reconsider the effect of the whole phrase "customer, broker or broker's customer in respect of goods entrusted to them," from this standpoint and with a view of seeing whether there is any relation in which they all stand to the assured which makes it possible at once to fix their identity and to justify the exception in regard to each of them indifferently. That relation, in my judgment, is that the customer of the assured, the broker or the broker's customer must, each and all of them, be such with reference to the particular goods so entrusted to them. And Ellison was not, and never pretended to be and was not treated by the appellant as being, a customer in that sense in relation to either of the necklaces now in question.

My Lords, I am in entire agreement with McCardie J. on this point. I cannot think that it would have been dealt with in the Court of Appeal so lightly as it was, if the Lords Justices had noticed that reasons which may be apt enough to justify the inclusion of customers of the assured as such in the exception have no application either to brokers or *their* customers, and that in construing the clause no wider meaning can properly be attached to the word "customer" in the one case where it is used than in the other.

Order of the Court of Appeal reversed, and judgment of McCardie J. restored. The respondent to pay the costs in the trial of the action before McCardie J. and also the costs in the Court of Appeal and in respect of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 4, 1927.

Solicitors for the appellant: *Kenneth Brown, Baker, Baker.*

Solicitors for the respondent: *Windybank, Samuell & Lawrence.*

Applied. YACHUK *v.* OLIVER BLAIS CO., LTD. [1949] 2 All E.R. 150.

[PRIVY COUNCIL.]

ROBINS . . . . . APPELLANT ;

AND

NATIONAL TRUST COMPANY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

J. C.*
1927
Feb. 7.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Privy Council Practice—Concurrent Findings—Authority of Decision of Appellate Court of Colony.

The rule of practice of the Judicial Committee that concurrent findings of fact will not be interfered with, in the absence of very definite and explicit grounds, applies from whatever Court in the Empire the appeal is made.

A decision of the appellate Court in a Colony which is regulated by English law is not assumed by the Judicial Committee to be wrong because it conflicts with a decision of the Court of Appeal in England; it is otherwise if the conflict is with a decision of the House of Lords or of the Privy Council.

Judgment of the Appellate Division affirmed.

APPEAL (No. 122 of 1925) from a judgment of the Supreme Court of Ontario, Appellate Division (April 3, 1925), affirming a judgment of Mowat J.

The appellant brought an action in the Supreme Court of Ontario against the respondents to set aside the will of E. C. Walker, deceased, dated February 27, 1914, alleging want of testamentary capacity in the testator, also that the will was obtained by fraud and undue influence. The respondents were the executors, trustees and principal beneficiaries under the will.

The trial judge (Mowat J.) found against both the above allegations, and dismissed the action. The Appellate Division unanimously affirmed the decision by a judgment delivered by Orde J.A., the other members of the Court (Latchford C.J., Middleton J.A. and Masten J.A.) concurring.

* *Present:* VISCOUNT FINLAY, VISCOUNT DUNEDIN, LORD PARMOOR, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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1926. Nov. 25, 28, 29. *Stuart Bevan K.C.*, *Fleming K.C.* and *Sir Robert Aske* for the appellant.

Osler K.C. and *Rodd K.C.* for the respondents the National Trust Co.

Hellmuth K.C. for the other respondents.

1927. Feb. 7. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. The late Edward Chandler Walker was at first senior partner of the firm of Walker & Sons, and thereafter when that firm was changed into a limited company was president of Walker & Sons, Ld., whiskey distillers, in Walkerville, Ontario. He was a very wealthy man, married, but with no children, and he died on March 11, 1915, leaving a widow. He left a will of date February 27, 1914, and the respondents are the trustees and the principal beneficiaries under the said will. The said will revoked all prior wills. The testator had made a prior will on December 21, 1901, under which the appellant is a beneficiary. The present action is at the instance of the appellant to set aside the will of 1914, and restore the will of 1901. The grounds on which he seeks to set aside the will of 1914 are : (1.) Want of testamentary capacity in the testator on the date of the execution of the said will ; (2.) Fraud or undue influence by which the testator's brothers obtained the execution of the said will.

The appellant was manager of the company, both as a firm and afterwards as a limited company, for a long period, and was on terms of great intimacy with the testator. The appellant left Walkerville in 1914, and went to England. He alleges that he only came to know of the will of 1901 under which he was a beneficiary, and of the state of affairs as at the date of the will of 1914, in April, 1922. On June 23, 1923, he raised the present action against the executors, and the beneficiaries were afterwards added as defendants.

The action was tried before Mowat J. without a jury. Evidence was read on both sides. The evidence was voluminous and contradictory, and the trial lasted six or seven days. The learned judge found that no testamentary incapacity

of the testator had been made out, and that it had not been shown that the execution of the will was induced by fraud or undue influence, and he dismissed the action. Appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously affirmed the judgment of the trial judge. Appeal has now been taken to the King in Council, and the appellant has sought to induce their Lordships who sat on this Board to examine and revise the evidence and to come to the conclusion that the result arrived at by the trial judge and the Appellate Division was wrong.

This raises in a quite distinct way the question of whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board.

Being, as has been said, a rule of conduct, and not a statutory provision, the rule is not cast iron; but it would avail little to try to give a definition which should at once be exhaustive and accurate, of the exceptions which may

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arise. It will be sufficient to quote what has been said on this subject in the past :—

In *Moung Tha Hnyeen* v. *Moung Pan Nyo* (1) Lord Hobhouse, delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said : " There has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned."

In *Rani Srimati* v. *Khajendra Narayan Singh* (2) Lord Lindley repeated the view : " The appellants have failed to show any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all. Such an attempt was made with great skill and pertinacity by Mr. Bevan for the appellant in the present case. He laid stress on the law as it had been authoritatively settled in England, and in Ontario in such matters the law of England

(1) (1900) L. R. 27 I. A. 166, 167. (2) (1904) L. R. 31 I. A. 127, 131.

rules. Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will. Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies, even though the action is to attack a probate which has been granted long ago.

These propositions will be found to be settled by the following cases: *Barry* v. *Butlin* (1); *Cross* v. *Cross* (2); *Tyrrell* v. *Painton*. (3)

Now their Lordships will assume that these cases are right. The reason for this form of expression is that the appellant represented that the Appellate Division of the Supreme Court of Ontario in the case of *Larocque* v. *Landry* (4) had taken another view, in that it held that once probate was granted, though only in common form, the onus was on him who sought to set it aside, and the Court in this case held itself bound by that case. It is questionable whether that is the result of the decision. But assuming that it is, when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board. But in the present case their Lordships do not consider it necessary to

(1) (1838) 2 Moo. P. C. 480.
(2) (1864) 3 Sw. & Tr. 292.
(3) [1894] P. 151.
(4) (1922) 52 Ont. L. R. 479.

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settle which of the two possible views as to the onus is right; they will assume, for the purposes of this discussion, that the English rule is right. But given the law the appellant in their Lordships' opinion fails in its application to the facts.

Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

That seems to their Lordships the case here. After reviewing the evidence as to capacity the learned trial judge says: "The result of this evidence pieced together, dovetailed together, combined and considered as a whole does not make me think that there was anything which would affect the mind or which would show the incapacity of the late E. C. Walker to make his will when he did." The Appellate Division first stated the grounds put forward by the appellant for the reversal of the judgment of the trial judge thus: "That the evidence established that the testator was not mentally capable of making a will at the time when the alleged will was executed"; and after examining the evidence the judgment concludes thus: "The plaintiff

clearly fails upon the first of his grounds for the reversal of the judgment."

There is a passage at the beginning of the trial judge's judgment which shows that on the question of onus he agreed with what had been laid down by the Court of Ontario, and the appellant argued that the learned judges of the Appellate Division must be presumed to have had the same views, and that, consequently, the whole judgment was vitiated by this wrong view as to onus. But, as has been already explained, there was no question of onus in the determination as it came to be made. It was a considered result of the evidence, and onus as a determining factor never arose, for the learned judges could, and did, come to a positive conclusion on the evidence laid. Learned counsel laid stress on the fact that the trial judge expressed the result of his view in a negative fashion: "The evidence does not make me think that there was anything which would show the incapacity of the testator." And he argued that that was no positive finding of capacity as the authorities require. The learned judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive.

Their Lordships therefore think that the attempt to avoid the effect of the concurrent finding rule fails. Much was sought to be made of the unfair way in which the appellant argued the trial judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons. Thus in *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (1) the judgment of their Board states: "The rule (as to concurrent findings) is none the less applicable

(1) (1902) L. R. 30 I. A. 41, 43.

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because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence." No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will : see *Craig* v. *Lamoureux*. (1)

In their Lordships' opinion the rule as to concurrent findings clearly applies in this case, and the appeal falls to be dismissed. A petition was lodged for the admission of new evidence. This application had been made to the Court of Appeal and refused. Their Lordships will be slow indeed to interfere with the decision of the local Court on what is really a question of discretion and procedure. This petition therefore falls to be dismissed with costs.

Their Lordships will humbly advise His Majesty in accordance with the above opinion. The appellant will pay the costs of the appeal.

Solicitors for appellant : *Collyer-Bristow & Co.*

Solicitors for respondents : *Blake & Redden ; Freshfields, Leese & Munns.*

(1) [1920] A. C. 349.

[HOUSE OF LORDS.] H. L. (E.)*

1927

April 4.

OWNERS OF S.S. RUAPEHU AND OTHERS . . . . . } APPELLANTS;

AND

R. AND H. GREEN AND SILLEY WEIR, LIMITED . . . . . } RESPONDENTS.

THE RUAPEHU.

Shipping—Dockowners—Ship Repairers—Damage to Ship by Fire in Dock—Ship under Repair—Limitation of Liability—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 *Vict. c.* 32), *s.* 2.

By s. 2, sub-s. 1, of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the owners of any dock (which by sub-s. 4 includes dry docks) "shall not, where without their actual fault or privity any loss or damage is caused to any vessel . . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . . owner . . . . performs any duty or exercises any power."

The respondents, ship repairers at Blackwall where they owned a dry dock, sought to limit their liability under this section in respect of damage caused by a fire which broke out on the appellants' vessel owing to the negligence of the respondents' servants while the vessel was being repaired by them in the dry dock:—

Held (by Viscount Haldane, Viscount Sumner, and Lord Atkinson; Lord Wrenbury and Lord Blanesburgh dissenting), that the right to the limitation of liability conferred by the section on dockowners by whom damage was caused without their actual fault or privity did not depend upon the quality of the act causing the damage, but upon the area within which the act was done; that consequently the right was not confined to acts done by dockowners in their capacity of dockowners, but extended to acts done by them in their capacity of ship repairers.

London and South Western Ry. Co. v. *James* (1872) L. R. 8 Ch. 241 applied.

The City of Edinburgh [1921] P. 274 explained and distinguished.

Decision of the Court of Appeal [1927] P. 47 affirmed.

APPEAL from a decision of the Court of Appeal (Bankes, Atkin, and Sargant L.JJ.), reversing a decision of Hill J. in an action of limitation of liability.

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, and LORD BLANESBURGH.

H. L. (E.) 1927 OWNERS OF S.S. RUAPEHU v. R. AND H. GREEN AND SILLEY WEIR, LD.

The facts are stated in the report of the case before the Court of Appeal and are summarized in the headnote.

1927. Jan. 31; Feb. 1. *Jowitt K.C.* and *G. St. C. Pilcher* for the appellants. The question is whether in construing s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which extends the statutory limitation of liability to dockowners, the quality of the act done must be considered—whether the act is done by the dockowners in their capacity of dockowners or in some other capacity—or only the place in which the act was done. No violence need be done to the words of the section if it is merely construed as meaning that dockowners shall not be liable if they do something within their duties as dockowners; the intention could not have been to include an act done by them in another capacity, say as ship repairers. A person should be protected under the section only so far as he is acting as dockowner. The repairs which were being done to the *Ruapehu* when the fire arose were entirely internal and might have been done when the ship was on the water. It has been admitted throughout that some qualification must be placed on the words of the section and that qualification should be dockowners "as such." The fire was caused by the negligence of the servants of the ship repairers, the respondents, for which they have been held liable at law. It was merely adventitious that this damage occurred in he dock at all. The words at the end of s. 2, sub-s. 1: "Performs any duty or exercises any powers," must mean as "dockowner." Suppose a dockowner has a ship chandler's business and supplied as such bad rope which causes damage to a ship in his dock, surely in such a case he cannot rely on his limitation of liability as dockowner. A ship repairer might be doing repairs to ships in two docks and have hired one of the docks; then the absurd position would arise that in one dock his liability would be limited, but in the other not limited.

[They referred to *The City of Edinburgh.* (1)]

(1) [1921] P. 274.

H. P. Macmillan K.C. and *G. P. Langton K.C.* (with them *K. S. Carpmael*) for the respondents. The principle of the limitation of liability for acts of negligence in maritime matters is purely a creature of legislation and it has been rather a favourite of the legislature, as there has been a progressive extension. All are agreed that the origin of the limitation is founded on the public interest. The question is how far has the extension gone. The words of the section should be taken as they stand in their literal meaning unless that would lead to a great absurdity: *Vacher & Sons* v. *London Society of Compositors*. (1) Verbally the respondents are clearly within the section. They are owners of a dock and damage has been caused by their negligence. But it is said it must also be established that the damage was sustained by the ship in consequence of an act the quality of which appertained to the function of a dockowner. The burden is on the ship to show that is so. The owner of a dock is made to include under sub-s. 4 of s. 2 a dry dockowner, and a dry dock is a place for surveying and repairing any ship and is designed for that very purpose. Sect. 2 carefully omits the words in s. 1 as to damage being due to improper management or navigation of the ship. Illustrations of cases which might happen are of very little assistance. The respondents do not question the decision in *The City of Edinburgh* (2), but it is very far from this case, The test is the locality and not the capacity in which the act is done, and as the respondents are dockowners and there has been a casualty to a ship for which they have been held vicariously responsible they are within the letter of the section, and no absurdity arises here in construing the words of the section as they are.

G. St. C. Pilcher replied.

The House took time for consideration.

1927. April 4. VISCOUNT HALDANE. My Lords, this is an appeal from a judgment of the Court of Appeal which reversed a judgment of Hill J. in an action brought by the

(1) [1913] A. C. 107, 117. (2) [1921] P. 274.

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respondents as plaintiffs in which they sought to limit their liability for damage and loss arising out of a fire to 69,067*l.* 7*s.* 2*d.* with interest. This limitation was claimed under s. 2 of the Merchant Shipping Act, 1900, which enacts that (inter alios), the owner of docks of various kinds, which include dry docks, is not to be liable for loss or damage to any vessel, where the loss or damage is caused without his actual fault or privity, beyond a statutory limit. It is conceded that there was neither actual fault nor privity in this case. The respondents are the owners of a dry dock at Blackwall, and they carry on there the business of ship repairers.

In May, 1923, the steamship *Ruapehu* was lying in the respondents' dry dock at Blackwall undergoing repairs which they were carrying out. A fire took place in her hold and the vessel was seriously damaged. The owners commenced an action for such damage before Hill J. He gave judgment for the owners against the present respondents. The Court of Appeal affirmed his decision. The respondents then commenced the present action for a declaration, under the Merchant Shipping Act of 1900, of limitation of liability. The question was raised whether the respondents were dock-owners within the meaning of s. 2 of that Act, a preliminary point which was disposed of adversely to the respondents by Hill J., as trial judge, but in their favour by the Court of Appeal. The only question now before the House on this appeal is whether the decision of the Court of Appeal in the respondents' favour on this point was right.

Sect. 2 of the Merchant Shipping Act (Liability of Shipowners and Others), 1900, enacts (sub-s. 1) that " the owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding " a defined sum per ton of certain kinds of tonnage of ships which within a limited period have

been " within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power." Sub-s. 3 enacts that s. 504 of the Merchant Shipping Act, 1894, shall apply to this section as if the words " owner of a British or foreign ship " included a harbour authority, and a conservancy authority, and the owner of a canal or of a dock. Sub-s. 4 declares that for the purpose of this section the term " dock " shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties. It is clear that the respondents' dry dock at Blackwall was, at the material period, within the section.

The real question which we have to determine is whether the Act means that the respondents, who were repairers as well as dockowners, when doing the work which resulted in damage, are entitled to invoke the language used, or whether the limitation of liability is confined to acts done or omitted to be done by those whose function is that of dockowners only, and not, as in this particular case, of repairers also who are carrying out the repairs.

Hill J., the trial judge, thought that the negligence for which the present respondents had been held liable, had nothing to do with docking, or the arrangement of shorers or blocks, or the pumping out or letting in of water, or other matters necessary to the proper management of a dry dock or of a ship in relation to a dry dock. The work of the respondents was done, he thought, in the capacity of ship repairers, and not in that of dry dockowners. If shipowners were to hire space in a dry dock belonging to a public authority, and to employ ship repairers to do repairs to a ship while she lay there, and the repairers incurred liability by negligence, it would be clear that the liability as repairers did not amount to liability as dockowners. When liability is incurred by exactly the same kind of negligence, he was of opinion that the fact that the ship was in their dry dock did not turn the work into work done in the capacity of dockowners, for the mere circumstance that the ship was in the

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repairers' dry dock could not have that effect. Suppose that the negligence gave rise to a fire in the sheds belonging to the yard of those claiming limitation of liability, and that the fire spread to the ship, no one could say that this was negligence of the claimants in the capacity of dry dockowners, or that the liability was incurred in that capacity. This illustration, and other analogous illustrations which the learned judge gave, seemed to him to show that the liability in the present case did not arise from negligence from work done in the capacity of dockowners.

My Lords, the first observation which occurs on this reasoning is that the question of what liability arises must be determined by the words used in the section, and not from what might reasonably be expected in the actual circumstances of a case such as this. The legislature has, on grounds which may seem good or seem bad, employed certain language. With the special grounds which influenced it we have nothing to do. The only question is whether the words are clear. Now, turning to these, I cannot find any ambiguity in the language. It declares that the owner of a dry dock is not to be liable in excess of the statutory limit, and the conditions defining the limit are to be sought for within the area over which the dockowner performs any duty or exercises any power. There is not a word about the capacity in which the dockowner has acted. It may well be that Parliament desired to encourage the construction of docks even by professional repairers. The expressions used in the statute are indistinguishable from those used in the Merchant Shipping Act of 1894 and in earlier Acts of which that statute took the place. The dockowner is put in the same position as was a shipowner. Now, if we turn to the case of a shipowner, a question analogous to that which arises in this case was settled as long ago as 1872, not, it is true, by this House, but by the full Court of Appeal in Chancery, constituted of Lord Selborne, James and Mellish L.JJ., in the *London and South Western Ry. Co.* v. *James*. (1) The railway company, who were also shipowners,

1) L. R. 8 Ch. 241.

contracted to carry passengers and goods through from London to Guernsey. The passengers and goods were taken under the through contract by railway from London to Southampton, and were there put on board a ship which belonged to the railway company. A particular ship, on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. On claims for damages in respect of loss of goods and of life, it was held that the railway company was entitled to the limitation on liability imposed by the then Merchant Shipping Act of 1862, s. 54, the terms of which were for present purposes completely similar to those as regards ships of the Act of 1894. It was argued that the limitation had no application to the case of persons and goods carried by the shipowner when he was not merely shipowner but also carrier. But Lord Selborne and the Lords Justices held that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief given by the statute.

My Lords, the case I have cited presents only an analogy, but I think that the analogy is a very close one, especially for the reasons given in some detail, not only by Lord Selborne, but by Mellish L.J. The Court refused to entertain a distinction founded on the capacities in which the railway company contracted. It was held that the words of the enactment were so free from ambiguity as not to admit of any such distinction being drawn. Liability for what happened by the loss of the ship was specifically limited. I cannot find that this decision was noticed in the Courts below or in the arguments here, but I think that the principle adopted in it comes very close to that of the present case.

In the Court of Appeal, where the judgment of Hill J. was reversed, Bankes L.J. held that some restriction must be put on the generality of the words in the section enacting the limitation. He thought that this was the result of the decision in the case of *The City of Edinburgh*. (1) That was a case in which by the negligence of the servants of a firm of ship repairers a vessel and its cargo were damaged by fire.

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The repairs were being done in a dock belonging to the Mersey Docks and Harbour Board. The ship repairers sought to limit their liability on the ground that they were owners of a dry dock at Garston, some distance away. It was held by Hill J., who also tried that case, that they were not entitled to a limitation of their liability under the section we have to construe. For the section, in restricting the liability of the dockowner, had, in his view, regard to the area over which he "performs any duty or exercises any power." The liability was one incurred by the ship repairers as such at a distance, and not as dockowners or at or near their dock.

The Court of Appeal (Lord Sterndale M.R., Scrutton and Younger L.JJ.) affirmed this judgment, but expressions were used by the two former which point to a somewhat different reason from that of Hill J. having been in their minds. Lord Sterndale thought that the words must refer to a limitation of liability of the dockowner as such, i.e., "in respect of something in some way connected with his dock." Scrutton L.J. considered that the very wide words, if interpreted in their widest sense, would lead to absurdity, and it was an absurdity to limit the liability of a person who owned a dock for anything he chose to do in another capacity. Thus, while Hill J. made area or geographical restriction the basis of his judgment, the Court of Appeal, or at any rate the majority there, determined the case rather on the principle of distinguishing the capacity in which the repairer acted. I am not sure that Hill J., in his judgment in the present case, was not influenced contrary to his own opinion towards the view of capacity rather than geographical area, which appears to have been adopted by the Court of Appeal, which differed from his opinion on the point in the case of *The City of Edinburgh*. (1) Anyhow, in reversing his judgment in the case now before us, the Court of Appeal, differently constituted, reverted to the principle that the basis of the limitation was area and not capacity. Bankes L.J. expressly says so. He doubted whether *The City of Edinburgh* (1) decision was really based on any different principle, although

(1) [1921] P. 70, 274.

he admits the ambiguity of some of the expressions used in giving it. He held that to introduce a limitation which depends on the nature of the act done was to create unnecessary confusion. It was simpler to read the limitation as confined to area. Atkin L.J. agreed. He considered that to read the words of the section literally and to apply them to the circumstances of the present case, gave rise to no such absurdity as was contended for in *The City of Edinburgh* case. (1) Moreover it would often be impossible to determine whether particular work was done by a person as repairer or as dockowner. Sargant L.J. agreed. He held that there was no such absurdity in the repairers' contention as would justify a departure from the grammatical and ordinary interpretation of the words used in the statute.

My Lords, I, also, think that the words of the statute are too plain to admit of any other restraint being put on their operation than that of geographical area. I think that this is the result of the interpretation placed on the statute in 1872 in *London and South Western Ry. Co.* v. *James*. (2) That interpretation appears to me to be the true one, and I am of opinion that this appeal should fail.

VISCOUNT SUMNER. My Lords, the respondents, the plaintiffs in the limitation action, carry on business as ship repairers at Blackwall, where they own a dry dock. While they were repairing the appellants' steamship *Ruapehu* in their dry dock, fire broke out, without their actual fault or privity, and great damage was done to ship and cargo, for which at common law they were responsible. The evidence in the damage action was to the effect that the same negligence would have caused the same fire if the repairing work in question had gone on while the ship was afloat. No further evidence now material was given in the limitation action, but it was common ground that the respondents' business is to repair ships, and that at the time in question they were using their dry dock for the *Ruapehu* in the ordinary course of business. I think we must take this state of facts as the

(1) [1921] P. 70, 274. (2) L. R. 8 Ch. 241.

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basis of this appeal. True we do not know whether the respondents have a wet dock or any other submerged ground than such as may be necessary for docking and undocking ships in connection with the dry dock ; we do not know whether they also do repairs to ships afloat within their premises or to ships elsewhere, whether afloat or not ; we do not know whether they have any other business than that of ship repairers, but it seems to me that, if any of these questions could have affected the solution of the problem which arises on the primâ facie case for limitation of liability, the appellants should have provided the materials for such answers as might have served to modify or to negative that right. For present purposes the respondents are dry dockowners ; the damage was done in their dry dock and by their servants in the course of their employment ; and we know of no business carried on by the respondents except that of ship repairers who use their dry dock for that purpose.

My Lords, the language of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, is clear enough. "Dockowners," which includes dry dockowners without any specification of the use to which they put their docks, are expressly empowered, when liable for damage to ship and cargo occurring without their actual default or privity, to limit their liability as the respondents claim to do. The appellants' argument really is that the respondents are nevertheless not within the Act, because they are dry repairing dockowners, and themselves use their dry dock for one of the main purposes for which dry docks exist—namely, ship repairing. To adopt this argument is practically to strike dry docks out of sub-s. 4. The short answer is that the Act says nothing of the kind. The respondents fall within the description of those persons on whom the right of limitation is conferred. What is there in the words to restrict this description, so as to exclude them ?

The City of Edinburgh (1) does not, in my opinion, touch this case. What had to be decided and what was decided there was this—how far if at all was the right to limitation

(1) [1921] P. 274.

available, where the ownership of the dock and the use of that dock had no connection whatever with the damage or with the injured ship or cargo. The answer was not at all. A contrary conclusion would have made the Act confer a personal immunity, at the expense of owners of ships and cargoes whom they had wronged, upon persons who happened to own a dock somewhere else. The policy of the Act, beyond an intention to protect dockowners from being crushed by liabilities for accidents, which they cannot always avoid, is not declared on its face and would only be a subject of speculation now, but it certainly was safe to say, as Lord Sterndale said, that the section refers to a limitation of liability of the dockowner in respect of something in some way connected with his dock. This is the true ground of this decision, which, as a decision, cannot be questioned. I do not think it is either accurate or helpful to argue that this is a "docks clause" not a "repairers' clause," or that the action, which leads to the liability, must have been action by a dockowner "as such" (except in the sense of the above words) or must have consisted in "dockowning activities." If a dry dockowner or a graving dockowner is within the section, whether or not (so far as the words go) he repairs ships in his dock or only hires it to others, I cannot see why he is not acting as a dry dockowner "as such" when he repairs a ship in his own dock in the ordinary course of business. The appellants' argument really begs the question and further introduces criteria for distinguishing one case of damages from another almost infinitely complex, almost impossible to apply, and most arbitrary in their operation. The Act says nothing about them. They would not have been even plausible but for the notion that there is something in this kind of limitation, which public policy requires us to restrict, but this, as it seems to me, is purely a matter for the legislature. True there is the rule, that those who claim exemption from a common law liability must bring themselves within it, but this depends on the language of the Act. Here the right to the limitation is clear, provided the respondents are dockowners, as they are.

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The question is asked, à propos of Lord Sterndale's canon in *The City of Edinburgh* (1), "what connection is there in this case between the dry dock and the fire in the ship's hold?" The answer is, "The ship was in the respondent's dry dock and it was because she was in that dry dock that their careless workman was employed upon her at that time." True he might equally have been employed on the *Ruapehu* if she had been lying afloat at buoys in the Thames and might have been equally careless there, but these were not the facts. It is true also that, if independent repairers had been at work on the *Ruapehu* in the respondents' dock and had been liable for the fire, they would have been liable in full, but that is because they would not be dockowners in any way connected with the damage. Just as we cannot, as a matter of construction, extend the section to them when they are not dockowners, so we cannot exclude the respondents from it when they are. The proposition is not "necessarily connected" or "inevitably connected" with the dock but actually connected with it in some way. On the appellants' argument in half the cases of fire on board ship the shipowner would lose the benefit of the statutory limitation, because, as fire will break out equally on shipboard as on shore, if you upset lighted lamps or fling lighted matches among inflammable merchandise, there would be none but a casual connection between the burning of the cargo and the ownership of the vessel. This would revolutionize what is well settled under the Act of 1894 and many earlier Acts. I see no reason for treating the amending Act of 1900 in any different way. It may be that the section fastens on ownership because the ground of the limitation may be supposed to be the great inroad upon the property owned by the judgment debtor, if he were cast in damages without statutory limit, though this would have been an argument for deciding *The City of Edinburgh* (1) the other way, but it throws no light on the question before us or, if it does, the light favours the respondents, for the judgment debtors are equally liable for their servants' wrongdoing to the full extent of their

(1) [1921] P. 274.

property, whether the servants were heating rivets or fixing shores.

My Lords, I think further that nothing can be founded upon the specification of the parties, who are to enjoy the benefit of limitation of liability, or on the reference to the "area," over which they "perform any duty or exercise any power." These expressions form part of the context, but they neither add to nor take anything from the main operative words. The parties are four, dockowners (with a statement of what the word "dock" includes), canal owners, with no such statement, harbour authorities and conservancy authorities, both of these last as defined in the Merchant Shipping Act, 1894, s. 742, and not prima facie as owners of docks in any sense of the word. I find nothing here that excludes the respondents from being "dockowners" or that restricts the kind of operation in the course of which the liability that is to be limited is to arise. The reference to an "area" is inserted primarily in order to show where the appropriate measure for the amount of the limited liability is to be found, but in any case the *Ruapehu* was within the respondents' "area" when she was burnt. The words "performs any duty or exercises any power" are, it is true, odd words to apply to a private company using its own business premises and are suggestive of public authorities and undertakers, but, unless they have the effect of excluding private owners from the category of dockowners, which they clearly have not, they carry the present issue no further. As for the observation that the section, by including wharves and jetties in docks, may raise some difficult questions, when we come to consider whether in such cases the damage is "connected with" the dock, I agree that they may, and will consider them when they do, but I need say no more about them now.

The only sound way of construing such a section is to follow its exact words and give effect to them unless some plain necessity can be found for implying some limitation. There is no absurdity, no repugnance, no inconsistency produced by reading the words in their plain grammatical sense, and, so read, the conclusion must be that at which the

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Court of Appeal arrived. With that I agree. I think the judgment of the Court of Appeal should be affirmed and that this appeal should be dismissed.

LORD ATKINSON. My Lords, the facts have already been fully stated and it is unnecessary to repeat them. The parties are practically agreed as to the question which arises for decision in this appeal.

The appellants in the seventh paragraph of their case state it as follows: "7. It was agreed, as appears from the correspondence passing between the parties previous to the trial of the action before the Honourable Mr. Justice Hill, that the question raised by para. 3 of the Amended Defence as to whether the respondents were dockowners within the meaning of s. 2 of the Merchant Shipping Act, 1900, and as to whether they were entitled to limit their liability as such in the special circumstances of the present case, should be tried as a preliminary point and this is the only question for decision upon the present appeal."

The third paragraph of the amended Defence runs as follows: "The defendants deny that the plaintiffs are dockowners within the meaning of 63 & 64 Vict. c. 32 and further say that the said liability of the plaintiffs was incurred by them as ship repairers and not as dockowners."

And the respondents in the second paragraph of their case state it as follows: "The sole question which arises on this appeal is a preliminary point of law, namely, whether the respondents (plaintiffs in the action) who are owners of a dry dock at Blackwall are entitled by virtue of s. 2 of the Merchant Shipping Act, 1900 (63 & 64 Vict. c. 32), to limit their liability in respect of a fire caused by the negligence of their servants on board the steamship *Ruapehu* at a time when the said steamship was lying within the respondents' said dry dock."

A reference to a most helpful authority, not cited in argument, but appealing to one's common sense, at least in my view, shows that the contention of the parties is based upon a false principle. That authority is the case of the *London and South Western Ry. Co.* v. *James*. (1) I shall

(1) L. R. 8 Ch. 241.

refer to the case in detail presently, but I think I may at once say that it appears to me to determine that the right of the owners of a ship which has been lost or has met with an accident to limit their liability depends not so much upon what was the nature of the thing which met with the accident causing damage as upon what that particular thing was engaged in doing at the time the accident happened. The particular thing in that case was a ship, and the work she was engaged in doing was carrying passengers and goods from Southampton to Guernsey. Repairs, even substantial repairs, may be executed on a ship while she is in a wet dock belonging to certain owners, such as putting new boilers or engines into her while she is afloat, just as they may be possibly in a graving dock belonging to the same owners. In both cases she is in the hands of repairers, the only difference being that she rests upon and is upborne by the water in the one case, and rests upon mechanical supports in the other, but the owners of the docks, the harbour authority, or conservancy authority exercise control over the graving dock, as they do, and claim to do over the floating dock. I think it is a mistake to suppose that in the case of the graving dock this authority of the owners, the harbour authority, or the conservancy authority, is entirely superseded by that of the repairers who happen to be executing repairs upon the ship, which they would not be if the repairs were effected in a floating dock. In the case of the *London and South Western Ry. Co.* v. *James* (1), through tickets were purchased by these passengers from the company in London covering the whole journey by sea and land from London to Guernsey. No other kind of tickets were issued to them in London, and no tickets of any kind were issued to them in Southampton. When they arrived there they straightway embarked on a steamship bound for Jersey, in this case named the *Normandy*. Goods were loaded on this vessel to be carried to the same destination. In the course of the voyage the steamship *Normandy* collided with another steamship named *The Mary*, and sank.

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Many of the *Normandy's* passengers and their luggage and effects were lost and all her cargo was lost. In cross suits between the owners of the two vessels the *Normandy* was held alone to blame. Several actions were brought against the company, some by passengers for loss of luggage, injury and delay; some, under Lord Campbell's Act, by the administrators of the passengers who were lost. A case for limitation of liability was instituted in the Court of Admiralty, and an order was made by that Court restraining all these actions on payment by the company into Court of the sum of 6376*l.*, being 15*l.* per ton on the gross tonnage of the *Normandy* plus interest. On January 27, 1872, the Court of Exchequer, in an action instituted by one John James, one of the *Normandy's* passengers, decided that a writ of prohibition should issue to prohibit the Judge of the Court of Admiralty from enforcing the injunction issued by him.

This judgment was affirmed by the Court of Exchequer Chamber. This decision left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, free to proceed with them. The company thereupon filed a bill against the owners of the steamship *Mary*, and against the several persons who had actually instituted or threatened to institute actions against the company, stating the above facts, and also stating that the collision had occurred without the actual fault or privity of the company, and claiming that the company as the owners of the *Normandy* were entitled to such limitation of their liability as was in that behalf provided by the Merchant Shipping Act of 1854 and the Amendment Act of 1862, and alleging that the company for the purposes of the suit admitted their liability to the extent and to the amount mentioned in these Acts, and were willing to pay 15*l.* per ton on the gross tonnage of the *Normandy* and interest thereon.

The bill prayed for a declaration that the company were, as owners of the *Normandy*, entitled to the benefit of the limitation of liability under the Merchant Shipping Acts, and that the losses and damages in respect of which they

were answerable might be determined as the Court should direct, and that the defendants might be restrained from proceeding further in this suit or actions against the company.

John James, one of the passengers, denied that he had any notice of a by-law or any notice of the vessel by which he was to travel. The company allowed judgment to go by default in each of the actions which had been brought against them, but the damages had not been assessed. The Master of the Rolls granted an injunction against all the litigants except James. The other litigants were to be at liberty to have their damages assessed but not to levy them. The company appealed. The appeal was heard by a full Court. The principal point made upon the appeal was that the company were in this case acting as carriers of persons and goods, and that the Merchant Shipping Acts had no application to such cases.

Lord Selborne, in giving judgment, said (1) that: "the ordinary case was not excluded, and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section" (i.e., s. 505 of the Act of 1854). Mellish L.J. delivered a most helpful judgment. He said: "I think that the case clearly comes directly within the words of the Act. The London and South Western Railway Company were the owners of the ship *Normandy*, and they are sued by Mr. James for damages on account of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held within the Act, unless it is clearly not within what was the scope and intention of the legislature in passing the Act. But what was the scope and intention of the legislature in passing the Act? Ever since the reign of George II. there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting the liability to be incurred by the loss of goods; and this, previously to

(1) L. R. 8 Ch. 250, 252.

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Lord Campbell's Act, was the principal liability. It was thought expedient to limit the liability, because a ship might carry gold, or goods of great value, and then, from some trifling act of neglect on the part of the master, or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the legislature thought it was for the public advantage that there should be this limit on the liability of the owner. Why should not that apply to the case before us? The London and South Western Railway Company are encouraged by that limitation to embark, as shipowners, in the trade of carrying passengers and goods between Southampton and Jersey, and I do not understand what the grounds are upon which it is said they are not to avail themselves of the limitation. The ground put by the Master of the Rolls is simply that the passenger took a through ticket from London to Jersey. It was admitted that if the passenger had taken a ticket from London to Southampton, instead of from London to Jersey, and when he got to Southampton had walked on board the ship and gone as a passenger to Jersey, then he would be subject to the limitation. But what possible object can there be in holding that, in order that the company may avail themselves of the limitation, it shall be necessary to deprive all their passengers of the convenience of paying for their tickets at one time, instead of paying on two different occasions? Such a decision would not deprive the company of the benefit of the Act, and would only put the passengers to inconvenience. In my opinion the case is both within the words and within what I think was the spirit of the Act."

The words of this judgment apply as appropriately to the owner of a dock as they do to the owner of a ship. Are not the owners of docks encouraged by the right of limitation of liability to embark as dockowners in the trade of affording facilities to ships to load and unload, and be repaired in their dry dock? It is admitted that the words of the second section of the Merchant Shipping Act of 1900 must be construed, if they are to be at all reasonably construed, so as to put some limit on its general language. This must, I

think, be so, because the liability which is to be limited is the liability which would fall upon the dockowners if sued at common law for injury done to a ship in their dock by reason of the negligence of their servant. If the dockowners had docks at Leith and also docks at Southampton, and a ship was injured in the docks at Leith by reason of the negligence of the owner's servant, then if the dockowner was sued at common law in respect of the injury done at Leith, everything connected with the dock at Southampton would prima facie be held to be irrelevant and could not be gone into. Yet, as I understand it, it is contended that when the question is, what liability is to be imposed, the condition, value or management of Southampton Docks, though at common law irrelevant, becomes relevant for the purpose of fixing liability. This inquiry as to the limitation of liability must, in my view, be confined to the condition of things, and the occurrences in the docks in which the accident took place.

Bankes L.C. said that the second section of the Act of 1900 should be construed as if the words "whilst being at or upon the dock or canal" were, as I understand, inserted after the word "vessel" and before the words "be liable to damages beyond an aggregate amount not exceeding . . . ." These words will effect the just and desired object of confining the liability which is to be limited to damages inflicted in the docks or canal mentioned earlier in the section.

On that construction which, in my view, is necessarily the right one, the appeal fails and should be dismissed with costs.

LORD WRENBURY. My Lords, the question to be decided is as to the nature of the acts in respect of which a dockowner is by virtue of s. 2 of the Merchant Shipping Act, 1900, entitled to limit his liability. If he carries on the business not of a dockowner only, but of a ship repairer also, is he entitled to limit his liability in respect of acts done by him as a ship repairer?

I have to assume that such events have happened as that the dockowner has come under a common law liability in

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damages for some act done by his servants without his actual fault or privity. The section is one by virtue of which he is not to be liable in full for the damages which he is at law liable to pay. He is to be liable, so to speak, for less than he owes. It would be a material assistance if some principle could be suggested for this remission of liability, but it would seem to be the fact (and I accept it as being the fact) that the only ground for it is that a ship is a chattel of so great a value, that a full liability would be so heavy that the construction and ownership of docks would be discouraged unless limitation of liability were sanctioned. This, however, does not give much assistance towards determining what the extent of the concession is to be in order to achieve the object in view. But it does give some assistance towards saying that it is to the dockowner qua dockowner that the privilege is given.

The question is entirely one of the true meaning of s. 2 of the Act, and I prefer, in the first instance, to endeavour to ascertain that meaning for myself by a careful perusal of the section without reference, for the moment, to any authority; applying the usual principle of scrutinizing the language used, regarding in every case the context, bearing in mind the object indicated by the words, and thus settling the true meaning of the section in the particular circumstances of this case.

A dock owner, let us say, who is also a ship repairer, does acts in reference to a ship in the dock which he owns, but they are acts which are referable not to his character of dockowner but to his character of ship repairer. Is he entitled to limit his liability? That is the question. Purposely I assume that acts as dockowner and acts as ship repairer are capable of being discriminated. If they are not and all the acts may be taken as being done as dockowner, the question under debate does not arise.

The first guidance I obtain in reading the section is, that the dockowner is one of a group of four persons or bodies who are grouped together and form the common nominative to the verb which follows. They are: (1.) the owners of any

dock ; (2.) the owners of any canal ; (3.) harbour authorities ; and (4.) conservancy authorities. The last three of these four are not bodies likely to be contemplated as carrying on the business of ship repairers. I am entitled, I think, to say that the legislature, when it mentions the dockowner, is thinking of a dockowner comparable with the other three bodies, and not of a dockowner who may be carrying on other business in connection with ships, e.g., ship repairers or persons who supply ships' tackle.

Further, I find that by virtue of the definition in s. 2, sub-s. 5, the owner of a wharf or pier or jetty is, for the purposes of the Act, a dockowner. Many repairs may be done without going into dry dock. Suppose a ship repairer who undertakes the repair of a ship afloat, builds or buys for the purposes of his business a pier or jetty and moors the ship there while he is executing the repairs, is he a dockowner entitled to limit his liability in respect of acts done as a ship repairer ? It is truly said, I think, that it would be a cheap mode of insurance for such a ship repairer to become a dockowner by building or buying a pier.

The Court of Appeal measured the dockowner's right to limit his liability in respect of acts done as a ship repairer by geographical considerations, impressed, seemingly, by the fact that the section attributes importance to the area of the dock in that, in measuring the limit of liability, the ship whose tonnage is to determine the limit is to be the largest which, within a certain time, has been within the area. But there is nothing in the section to convey that the right to limit liability as distinguished from the measure of the liability is to be governed by the relative positions of the ship and of a dock which the ship repairer happens to own. If *The City of Edinburgh* (1) was rightly decided (and I think it was) in my judgment it governs this case—not, of course, that it binds this House, but that in material facts it is not distinguishable. A decision is indistinguishable when not the facts but the material facts are the same. *The City of Edinburgh* (1), differs from this case only in the one fact that the dockowner who

(1) [1921] P. 70, 274.

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was repairing the ship was repairing it in a dock which was not his own. The dock he owned was some miles away. In the present case the dockowner was " at home " ; he was repairing the ship in a dock which he owned. I fail to see any ground upon which he should be entitled to limit his liability in the one case and not in the other. As a dockowner he either is or is not entitled to limit his liability in respect of acts which he does in a business other than that of dockowner. He must succeed in claiming limited liability, if at all, by reason of the fact that he is a dockowner, not by reason of the fact that he is a dockowner " at home." I agree with Lord Sterndale that the liability in respect of which he claims limited responsibility must be a liability of the dockowner is such, i.e., in respect of something in some way " connected with his dock," and with Scrutton L.J. that his limited liability as a dockowner does not extend to " anything which he chooses to do in any other capacity."

In *London and South Western Ry. Co.* v. *James* (1) a question arose upon the Act, but the facts were inverted. The railway company were, as shipowners, entitled by virtue of the statute to limit their liability. The question was whether they had forfeited that right because they were also a railway company and contracted with the passenger to carry him on a journey which, commencing with a journey by rail, included a passage by sea. It was held that they had not. Here the question is whether the ship repairer has acquired a right to limit his liability by reason of the fact that he is a dockowner and is repairing a ship in his own dock. *London and South Western Ry. Co.* v. *James* (1) would have been in point if the accident had happened on the railway and the company had contended that their immunity as shipowner extended to the railway journey. That, of course, was not the case. I fail to see that that decision has any bearing upon the present case.

Every one is agreed that some limitation must be placed upon the general words of the section, because there would otherwise be included cases in which the application of this

(1) L. R. 8 Ch. 241.

section would lead to an absurdity. The proper limitation is, I think, to read the section as if it contained the words "as such" so that the dockowner as such will enjoy the benefit in respect of acts done by him as dockowner.

In my opinion the appeal should be allowed.

LORD BLANESBURGH. My Lords, that the actual decision of the Court of Appeal in the case of *The City of Edinburgh* (1) was not only right but inevitable, no one at your Lordships' Bar has been bold enough to contest. Any other result on the facts of that case would have been absurd. Nevertheless the dockowners there, on the grammatical and ordinary construction of the words of s. 2, sub-s. 1, of the Merchant Shipping Act, 1900, seemed entitled to claim a decision in their favour. The words of the section so construed appeared to cover their case exactly. Yet they failed, and, as is now agreed on all hands, they rightly failed. And for one of two reasons, either of which was, in that case, adequate. They failed, either because, as is suggested, it was the opinion of the Court of Appeal that the section is only operative to limit the liability—say of the owner of a dock—in respect of a claim within the section which is made against him in that character. Or they failed, as is suggested by the respondents, because the damage there sued for was sustained by the *City of Edinburgh* when she was outside the area of the repairers' dock, and the Court of Appeal was of opinion that the section is, on construction when a dock is in question, confined to cases where the vessel is actually within the dock at the critical moment.

My Lords, I was myself a party—albeit, a silent party—to that decision of the Court of Appeal. I have my own views of what the Court intended to decide. A statement of them might not have been irrelevant when this case was in the Court of Appeal. It would be of no moment now. The whole question is at large in this House, and it being conceded that the section, if absurd results are not in many cases to ensue, must be held to be limited either in the one

(1) [1921] P. 274.

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way or in the other, the duty is now cast upon your Lordships to choose between these two alternatives. The choice is vital. In the present case everything turns upon it. If the appellants' limitation be accepted—I may compendiously describe it as a "limitation by function"—their appeal will, I think, succeed. If the respondents' be adopted—their limitation may be termed a "limitation by area"—then even more inevitably the appeal must fail.

Some of the considerations to which your Lordships will have regard in making your choice between these two alternatives are not, I should suppose, open to controversy. The House would hesitate to accept a form of limitation calculated to lead to absurdities only less numerous and serious than those from which the unqualified section has thereby been rescued. A limitation again would be at once suspect if, as its result, it excluded from the benefit of the section cases for which, having regard to its whole frame and tenor, it must be presumed the Legislature intended to provide. Still another consideration occurs to me as apposite The benefit of the section is extended to four classes of beneficiary compendiously described as, the owner of a canal; the owner of a dock; a harbour authority; a conservancy authority. To each of these classes, various as they are in responsibility and status, the section extends a privilege in terms identical. It would seem to follow that any proper modification introduced into it must with equal appropriateness apply to every case, and, as the selection made will, when promulgated, apply to each member of every class benefited, it should owe nothing to the accidental circumstances of the case in which it was first called for. In other words, while your Lordships, in making your final choice, will not forget the position of the owner of a dry dock, who repairs vessels within it, neither will you fail to have regard to the resulting position under the section of the other beneficiaries, for example, that of a harbour authority, to which I will allude later.

Real assistance in this most important inquiry is, I think, supplied by an examination of the terms in which the classes

to be benefited are by the section defined. The aspect in which each of them is being regarded by the legislature is on such examination brought into full relief. A significance concealed by the compendious words of description employed in sub-s. 1 itself is thereby revealed.

Now the only one of these descriptive terms which is not subsequently expanded is the term "canal." Every other is the subject of a definition.

I begin with the word "owner." The "owners of a dock or canal" are defined to include "any person or authority having the control and management of any dock or canal as the case may be": sub-s. 5. An owner of a dock, that is to say, to be within the protection of this section, need not be in any sense a proprietor nor need he have any proprietary interest in the dock. He is entitled to the benefit of the section if he can say of himself that he controls and manages it.

A "dock" again, as has already been stated, includes many things besides dry docks. For facility of reference I again transcribe the miscellaneous list. The term includes "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places, and jetties": sub-s. 3.

This definition is, I think, significant in at least three relevant directions. When taken in connection with the definition of owner it shows how small is the place—even in the category of "owners of docks"—which is held by those of the respondents' sub-class. Again, while it is a catalogue of places with reference to each of which the owners in their "control and management" will frequently be responsible for damage to ships, very few of them are places in which even the possibility of their owners conducting upon them any separate business is other than remote, or is indeed existent at all. More particularly still the definition in its remarkable comprehensiveness seems to dispose once and for all of the suggestion—never a very hardy one—that the extension of the benefit of the section to the respondents as repairers of ships under the name of the owners of a dry dock may be justified by the view that the legislature

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had an intention to encourage such repairers to construct their own dry docks wherein ship repairs could be carried out. The principle of *noscitur a sociis* is fatal to such a suggestion.

The definitions of a harbour authority and a conservancy authority are also specially illuminating in the present connection.

Harbour authority includes "all persons or bodies of persons, corporate or unincorporate, being proprietors of, or intrusted with, the duty or invested with the power of constructing, improving, managing, regulating, maintaining or lighting a harbour." Merchant Shipping Act, 1894, s. 742.

Conservancy authority includes "all persons or bodies of persons, corporate or incorporate, intrusted with the duty or invested with the power of conserving, maintaining or improving the navigation of a tidal water." Ibid.

Now, my Lords, this being a section by which an identical benefit is, in identical terms, conferred upon these various classes of persons or bodies, it is manifestly important to discover, if one can, whether there is now disclosed any characteristic position or responsibility common to them all and of a nature not inappropriate to instruct the benefit which by the section is indifferently extended to each.

And first, it cannot be suggested that all the persons or bodies concerned are looked upon as the potential owners of separate businesses from any of the responsibilities of which they should have their liability limited. This is not so of any one of them, even in their sub-divisions; it is almost unthinkable in relation to a conservancy. Ownership or the possession of a proprietary interest again is not the essential thing. Even in the case of a canal or dock, it is not, as has been seen, essential to limitation; in the case of a conservancy authority, the possibility of ownership is not so much as mentioned in the definition, and in the case of such an authority such possibility *ex necessitate rei* is indeed remote.

But the examination discloses the striking fact that there is attached to every one of the four a responsibility which,

while in no way inconsistent with ownership, is capable of a separate existence. That responsibility is in relation to canals and docks described as the power of "control and management": it is in relation to harbour authorities and conservancy authorities, the discharge of the duties and powers with which they are respectively entrusted and invested. And there being nothing in the section necessarily leading to any other conclusion, I should myself have thought, on a consideration of these things alone, that the liability and the only liability which under it a defendant is in any circumstances entitled to limit is a liability which, in the case of "the owner of a canal or dock," arose from his responsibility for the control and management of the canal or dock, and in the case of a harbour authority or conservancy authority arose from its discharge or failure to discharge some duty or power with which the authority in question was entrusted or invested.

But, my Lords, the correctness of this view by no means depends on that consideration alone. Later, in describing the area with reference to which the limit of liability is to be ascertained, the section refers to it as the area "over which such dock or canal owner, harbour authority or conservancy authority performs any duty or exercises any power"—the same terms being employed, it will be noticed, both with reference to the "owners" and the "authorities"; and the terms chosen and made applicable to all being taken from the actual definitions of the harbour and conservancy authorities to which reference has been made. My Lords, that comprehensive reference couched in terms so significant when these are traced to their origin, supplies to my mind the strongest confirmation of the view that the liability with which the section is dealing is a liability arising as above stated and it alone.

But the argument does not stop even there. Sub-s. 6 of this s. 2 has not yet been alluded to. To my mind it clinches the whole matter.

The sub-section is as follows: "Nothing in this section shall impose any liability in respect of any such loss or damage

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on any such owners or authority in any case where no such liability would have existed if this Act had not passed."

My Lords, the necessity, or, at the least, the propriety of such a reservation is apparent if the liability referred to is intended to be confined to a liability arising from the performance of a duty or the exercise of a power in relation to a canal, dock, harbour or conservancy area. But how entirely otiose and unnecessary it becomes if the liability to be limited is one that may arise on the part of the " owner " or " authority " on any account whatever.

Accordingly, my Lords, by reference to the terms of the section, unaltered and unexpanded, but, be it noted, to all its terms, I reach the conclusion that the liability of the respondents to the appellants, already established in this House, is entirely outside its protection. That liability was in no way referable to the duties or powers of the respondents as owners of their dock. The negligence which led to the fire on the steamship *Ruapehu* in the dry dock of the respondents was negligence of their servants in the course of their duties as ship repairers—it was negligence which would have caused the fire wherever the vessel had been, whether in the dock of the respondents or of another, whether in a dock at all or afloat.

My Lords, I would further observe that the relevance to the present discussion of sub-s. 6 of this s. 2 is very pointedly illustrated by the case of *London and South Western Ry. Co.* v. *James* (1), to which reference has been made by three of your Lordships. I think myself that the distinction between that case and the present has been clearly shown by my noble and learned friend, Lord Wrenbury. I refer to it again only because the whole basis of Lord Selborne's judgment is confirmatory of the view of this present section which I have ventured to present to your Lordships.

The gist of Lord Selborne's judgment is to be found in the following words of the report: " We think it manifest that the ordinary case, or at least one of the most ordinary

(1) L. R. 8 Ch. 241, 249.

cases, in all contracts of affreightment, is that of the ship-owner carrying on board his own ship. The corresponding term 'carriage,' occurring in the 505th section of the Act of 1854, with what is there said about freight, appears to me to show that the ordinary case was not excluded, and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section."

My Lords, I claim support from these words: "Whether the owner was carrier or not." Lord Selborne there recognizes a duplication of function exactly comparable to the duplication of function in the case of the owner of a dry dock who also repairs vessels within his dock. But more apposite still, these words foreshadow the principle which in terms is to be found embodied in sub-s. 6 of this section. The liability of the respondents as ship repairers will be limited by the section only to the extent to which as owners of a dock they are under the same liability. But they must as dockowners be under some liability if there is to be any limitation at all. When the dockowner is also ship repairer he will be entitled under the section to limit the amount of such damage as would, in a question between the ship and the dockowner, have been recoverable against the latter had he been some one other than the ship repairer. And to a limitation of that damage he will be entitled, whether or not in respect of it he was also liable as ship repairer or in any other character. But liability as dockowner for that damage there must be.

The strength of the appellants' case is not, however, dependent only on the cogency of the considerations by which it can be affirmatively supported. It gains almost as much from the destructive criticism to which the respondents' alternative limitation is exposed. It is, I think, true of that limitation to say, first of all, that it is purely arbitrary. It will enable those in the position of the respondents to limit their liability where its origin was, in connection with their dock, as remote or accidental as was the liability in the case

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of *The City of Edinburgh*. (1) I agree with my noble and learned friend, Lord Wrenbury, in thinking that there is, in principle, no distinction between the facts of that case and the present. But, secondly, I think this limitation is calculated to create absurdities hardly less serious than those which it would remove. Under it the liability for any damage done by the respondents, even as ship repairers, would be limited if the vessel in question were within the dock of the respondents; their liability, even as dockowners, for damage done by them without their actual fault or privity, would be unlimited if the vessel were in another dock or even just outside their own. The limitation, too, would produce the striking result shown by one of the illustrations of Hill J. He supposes the case of a railway company owning a pier —which is a "dock" within the meaning of the section— and also steamships. The railway company for reward permits another ship to be at the pier. One of the railway company's steamships, by the negligence of the master or crew, collides with and sinks that ship. The negligence arises and the liability is incurred in the capacity not of pier owner but of steamship owner. Yet the respondents' proposed limitation would presumably entitle the railway company, if it suited them, to limit their liability by the standard provided by the Act of 1900, and not by that provided by the Merchant Shipping Act, 1894. More serious still, the limitation proposed by the respondents would exclude from benefit cases—it may be many cases— which I suggest to your Lordships are demonstrably intended to be within the benefit of the section. Take, by way of example, one reponsibility of a harbour authority. Amongst the defined duties of such an authority is, as has been seen, that of lighting its harbour. Suppose that without the actual fault or privity of the authority the entrance to its harbour is on some stormy night left unlighted, and in consequence a vessel making for that entrance loses her bearings and is wrecked on rocks outside the harbour. My Lords, that would, I should suppose, be the case of cases clearly within

(1) [1921] P. 274.

the protection of the section so far as a harbour authority is concerned. Yet, if your Lordships are induced to sanction, as the proper and necessary limitation, this limitation by area, the authority would, I conceive, in such a case, be left liable without limit of amount for the total loss of that ship.

My Lords, the only purpose of introducing the limitation by area in preference to a limitation by function, is to include within the section liabilities incurred on what I may call general account. I have given my reasons for the view that such liabilities are quite outside the scope of the enactment. It is, however, permissible to suggest in the present connection that a court of construction should hesitate before, by actually reading words into the section which are not there, it is led at such a price as that just indicated to produce a result at once so dubious and so equivocal. Limitation by area can, admittedly, only be made effective by reading words into the section. Unlike, as I think, limitation by function, it cannot be extracted from the section as it stands.

My Lords, I find myself in this case and for these reasons in agreement with my noble and learned friend Lord Wrenbury.

In my judgment it would be proper for your Lordships to discharge the order appealed from and restore that of Hill J.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 4, 1927.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Pritchard & Sons.*

[HOUSE OF LORDS.]

H. L. (E.)*
1927
May 24.

SEYMOUR . . . . . APPELLANT;

AND

REED . . . . . RESPONDENT.

Revenue—Income Tax—Profit from Employment—Proceeds of professional Cricketer's Benefit Match—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

A professional cricketer in the service of the Kent County Cricket Club might, by the rules of the club, be granted a benefit, but this was on the express understanding that he allowed the proceeds to be invested in the name of trustees of the club during the pleasure of the committee. The invested sum was always, however, eventually handed over to him when his career as a cricketer was over, or when he found an investment of which the trustees approved.

The appellant, a professional cricketer in the employment of the club, was granted a benefit, the proceeds from which, together with subscriptions, after being held by the trustees on certain securities, were eventually handed to the appellant and applied by him in the purchase of a farm. The appellant having been assessed under Sch. E, r. 1, of the Income Tax Act, 1918, on so much of the fund as represented the gate money at the match:—

Held (by Viscount Cave L.C., Viscount Dunedin, Lord Phillimore, and Lord Carson; Lord Atkinson dissenting), that the appellant was not assessable in respect of this sum, inasmuch as it was a personal gift, and not a profit or perquisite arising from his employment within Sch. E, r. 1.

Herbert v. *McQuade* [1902] 2 K. B. 631 and *Blakiston* v. *Cooper* [1909] A. C. 104 distinguished.

Decision of the Court of Appeal [1927] 1 K. B. 90 reversed and decision of Rowlatt J. [1926] 1 K. B. 588 restored.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J. upon a case stated by the General Commissioners of the Income Tax Acts for the division of Lower South Aylesford, Kent. The sole question for determination was whether the appellant was assessable under Sch. E, r. 1, of the Income Tax Act, 1918, in respect of a sum of 939*l.* 16*s.*, being the net proceeds derived from a benefit

* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

match played at Canterbury in the year 1920 under the direction of the Kent County Cricket Club for the benefit of the appellant.

The Commissioners were of opinion that this sum was a donation or gift and was not an emolument or profit arising from the appellant's employment, and was consequently not assessable to income tax.

Rowlatt J. affirmed the determination of the Commissioners, but his decision was reversed by the Court of Appeal by a majority (Lord Hanworth M.R. and Warrington L.J. ; Sargant L.J. dissenting).

The facts are fully stated in the report of the case before the Court of Appeal.

1927. May 3, 5. *Sir John Simon K.C.* (with him *W. T. Monckton*) for the appellant. This sum was received by the appellant as a token of appreciation of his exceptional personal merit and qualifications as a cricketer and did not accrue to him by virtue of his employment by the Kent County Cricket Club. It was not a perquisite or profit within the meaning of Sch. E, r. 1, but was a personal gift given on a single occasion on account of his special qualities as a cricketer. No valid distinction can be drawn between this gate money and the subscriptions, which the Crown does not seek to assess. Both are in substance personal gifts to the appellant from the public. This was a question of fact for the Commissioners and there was evidence to support their conclusion. *Herbert* v. *McQuade* (1) is distinguishable. In that case the respondent, a beneficed clergyman, received for many years a grant from a fund having for its object the augmentation of benefices below a certain value, and it was held on the facts that the grant was not a gift personal to himself, but accrued to him by virtue of his office of incumbent—that it was a gift to the benefice and not to the person—and that consequently it was a perquisite or profit accruing by reason of his office. The true test is, as Collins M.R. stated in that case, whether the gift is a personal

(1) [1902] 2 K. B. 631, 649.

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gift for exceptional merit or is a gift to the office rather than to the holder. In the latter case it is conceded that the fact that the payment is voluntary does not affect the matter. In *Blakiston* v. *Cooper* (1) (the Easter offering case) the appellant was made liable to income tax because the money was an annual gift to the incumbent in respect of his services as incumbent. But Lord Loreburn there said: "Had it been a gift of an exceptional kind, such as a testimonial, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." In *Turner* v. *Cuxon* (2) a grant made from the Curates' Augmentation Fund to a curate "in recognition of faithful service for more than fifteen years," was held by Lord Coleridge to be given to him, not as being curate of the parish, but as a donation honoris causa and consequently not to be assessable to income tax. That case was recognized as an authority by Collins M.R. in *Herbert* v. *McQuade*. (3) *Poynting* v. *Faulkner* (4) was a mere case of an augmentation of stipend and not a personal gift. But in *Turton* v. *Cooper* (5) (an Easter offering case) it was decided on the facts that the offerings were not given as an additional remuneration, but on account of personal poverty and were therefore not assessable. *Cowan* v. *Seymour* (6) also supports the appellant's case.

Sir Thomas Inskip S.-G. and *Reginald Hills* (*Sir Douglas Hogg A.-G.* with them) for the respondent. This sum was part of the profits or emoluments accruing to the appellant from his office or employment as a professional cricketer in the employment of the Kent County Cricket Club and comes within the words of r. 1 of Sch. E, "all salaries, fees, wages, perquisities or profits therefrom," i.e., from the employment. It was paid to the appellant while in the employment of the club by his employers in pursuance of their regulations for the staff and of their practice of arranging benefit cricket matches for the members of the staff. A professional

(1) [1909] A. C. 104, 107.
(2) (1888) 22 Q. B. D. 150.
(3) 22 Q. B. D. 631, 647.
(4) (1905) 5 Tax Cas. 145.
(5) (1905) 5 Tax Cas. 138.
(6) [1920] 1 K. B. 500, 517.

cricketer, on entering the employment of the club, knows that he has an opportunity of adding to his ordinary emoluments in the shape of the proceeds of a benefit match. This money really came to the appellant from his employers and is distinguishable on this ground from the subscriptions which came from the outside public. The suggestion that unless the payment can be attributed wholly to the office—if in a greater or less degree, personal considerations enter into the matter—it is not a sum received by virtue of the office is met by *Blakiston* v. *Cooper* (1), where personal considerations materially affected the amount of the gift. There may be a casual payment or an annually recurring payment and the payment may be by the employer or by outside persons. In the case of an annually recurring payment it is unnecessary to consider whether it was provided by the employer or not, but in the case of a unique payment the fact that it was provided by the employer is an important element in considering whether it is liable to income tax. In *Cowan* v. *Seymour* (2), which was a case of a single payment, Lord Sterndale M.R., in arriving at the conclusion that the payment was a personal gift, laid great stress on the fact that the money did not come from the employer. The fact that this sum has been invested does not affect its liability to tax. This payment was given to the appellant as a member of the staff as a reward for his services; the capacity in which he received the money was that of a servant of the club. [They also referred to *Mudd* v. *Collins* (3); *M'Donald* v. *Shand* (4); and *Martin* v. *Lowry*. (5)]

Sir John Simon K.C. replied.

The House took time for consideration.

1927. May 24. VISCOUNT CAVE L.C. My Lords, in this case James Seymour, a professional cricketer, appeals against a judgment of the Court of Appeal in England by which, differing from the Commissioners for the General Purposes

(1) [1907] 1 K. B. 336; [1907] 2 K. B. 688; [1909] A. C. 104.
(2) [1920] 1 K. B. 500, 510.
(3) (1925) 9 Tax Cas. 297.
(4) (1923) 8 Tax Cas. 420, 424.
(5) Ante, p. 312.

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of Income Tax and from Rowlatt J., they held the appellant liable for income tax in respect of the net proceeds of a benefit cricket match.

In the year 1920 the appellant, who had been for many years in the employment of the Kent County Cricket Club at a salary and had played fine cricket, was allowed by the club to have a benefit match, the match selected being the Kent *v.* Hampshire match played in the Canterbury week. The club's regulations for the staff contained the following provision :

"Benefits and Tours.

"The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiaire [*sic*]. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

The gate money received at the match in question, less some expenses, amounted to 939*l.* 16*s.* 11*d.*, and this sum, together with other sums obtained by public subscription, was invested by the direction of the committee in certain securities, of which the income (less tax) for the years 1921, 1922 and 1923, was paid to the appellant. In the year 1923 the securities were realized and the proceeds, amounting (with the addition of certain other moneys) to 1914*l.* 14*s.* 5*d.*, were paid to the appellant with a view to their being applied, with the approval of the committee, to the purchase of a farm. Thereupon the respondent, the inspector of taxes, made an assessment upon the appellant under Sch. E of the Income Tax Act, 1918, in the sum of 939*l.* 16*s.*, being the net gate money received from the benefit match, for the tax year 1920–21, and the question for your Lordships to determine is whether this assessment was valid.

In considering this question, I will assume that the appellant was assessable (if at all) under Sch. E of the Act. It would

appear that in the year 1920–21 any assessment upon him must have been made, not under Sch. E, but under Sch. D (see *Great Western Ry. Co.* v. *Bater* (1)); but the law was altered by the Finance Act, 1922, and it has not been disputed that the assessment in the year 1923, if allowable at all, was properly made under Sch. E.

The question, therefore, is whether the sum of 939*l.* 16*s.* fell within the description, contained in r. 1 of Sch. E, of "salaries, fees, wages, perquisites or profits whatsoever therefrom" (i.e., from an office or employment of profit) "for the year of assessment," so as to be liable to income tax under that Schedule. These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Rowlatt J. put it: "Is it in the end a personal gift or is it remuneration?" If the latter, it is subject to the tax; if the former, it is not.

Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the committee of the club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his

(1) [1922] 2 A. C. 1.

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employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription; and, just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such, so the gate moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are (I think) in the same category. If the benefit had taken place after Seymour's retirement, no one would have sought to tax the proceeds as income; and the circumstance that it was given before but in contemplation of retirement does not alter its quality. The whole sum—gate money and subscriptions alike—is a testimonial and not a perquisite. In the end—that is to say, when all the facts have been considered—it is not remuneration for services, but a personal gift.

I am of opinion that this appeal should succeed, and that the order of Rowlatt J. should be restored with costs here and below, and I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I concur in all that my Lord has said. I have had the advantage of reading the opinion which is about to be delivered by my noble friend, Lord Phillimore, and I concur entirely with his exposition and analysis of what are generally known as the Easter offerings cases.

Personally I cannot help thinking that the whole trouble in this case has rather arisen from the fact that, although, of course, the controversy necessarily turned upon the particular words of Sch. E, yet, at the same time, I think it was a little forgotten to pay attention to the warning which I remember Lord Macnaghten gave us years ago when he said: "My Lords, I wish to remind you that income tax is a tax upon income." When I think of this little nest egg—which, of course, paid income tax as an investment and which, now that it has taken the form of a farm, will pay income tax under Sch. A—being treated, the whole sum, as income, honestly, had it not been for the fact that honourable judges,

whose opinions I respect, have come to another conclusion, I would have thought the contention was quite preposterous. I therefore concur in the motion which has been made.

LORD ATKINSON. My Lords, I regret that I am unable to concur with the judgment which has just been delivered by my noble friend on the Woolsack, the Lord Chancellor, and I further regret that I am unable to concur with the judgments given and about to be given by my other noble friends. In those circumstances I must, of course, assume that the conclusions at which I have arrived are erroneous, though I cannot feel convinced of it. I have this consolation, however, that if I err, I err in good company—namely, in that of the Master of the Rolls and of Warrington L.J., as he was when he delivered judgment in this case in the Court of Appeal.

In my view, this latter judgment, especially, appears to be sound, logical, sustained by the facts proved and consistent with the authorities cited in support of it. What has given me most trouble in the case is this—the bald, meagre and sketchy way in which the facts of the case have been stated.

It is rightly stated in the case that the sole question for decision is whether the large sum of 939*l.* 16*s.* 11*d.* derived by Seymour, the professional cricketer, from the benefit match played on the cricketing field of the Kent County Cricket Club, accrued to him, or came to him from his employment as the professional cricketer of this club, or was a gift not earned by him by the discharge, with special efficiency, of his duties as professional cricketer to the club, but independently of the discharge of those duties, unconnected with them, not in any way springing from them. Accordingly, one would, I think, suppose that in order to determine this question, the first thing to be fully ascertained would be what were the terms upon which Seymour was hired; what were his duties, what were the functions which he discharged upon the occasion of a benefit match being held; did he himself play in it? Did he in any way select

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the competing teams, or aid in the management of the fête, as it may well be styled ?

The only statement contained in the case at all touching upon these matters is the following : " (C) A professional cricketer in the service of the Kent County Cricket Club is granted a benefit on the express understanding that he shall allow the proceeds of the benefit to be invested in the names of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested is paid to the beneficiary. The invested sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment (such as a share in a business or farm) of which the trustees approve."

The following is an extract from the regulations for the staff of the Kent County Cricket Club bearing on the point, actually in force when the above-mentioned match was played. The regulation is headed " Benefits and Tours," and runs thus : " The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiaire. The committee also reserve the like discretion in regard to granting permission to any player to go on winter tour and in regard to dealing with remuneration receivable by him on account of such tour."

This regulation may be fully adequate to protect the committee from any legal obligation towards their professional cricketer being imposed upon the club or the committee in respect of the matters named, but it is quite inadequate to prevent that cricketer from having a hope or an expectation, or a formed belief that he will have a chance, if he discharged his duties well and to the satisfaction of his employers, of being given the prize of a benefit match. For all that appears, he owed no duties to the Kent club or to its committee save those which sprang from his position of professional cricketer. If he got the reward of a benefit match by reason

of the efficient discharge of those duties, it must, I think, in the absence of all evidence of the committee being influenced by any other motive, object, or aim, be held that this reward accrued to him by reason of the office or employment he held within the meaning of Sch. E of the Act of 1842, or came to him from that employment within the meaning of Sch. E, r. 1, of the Income Tax Act of 1918.

I cannot find anything in the case suggesting that the club, or its committee, had any motive, object or aim in giving the benefit of this match to Seymour, their officer, other than to reward him for the efficient discharge of the duties of his post.

It is here that the bald, incomplete and unsatisfactory provisions of para. 2 (*c*) of the case stated cause embarrassment. Surely it would have been easy to have ascertained from Seymour or the committee what, if any, was the agreement made with, or assurance given to him as to the result of holding a benefit match, or whether it was the usual practice of the club to permit any professional cricketer they had in their service to obtain this benefit if he discharged the duties of his post well, though admittedly it was a matter entirely in their discretion, and they were not bound to do so. Suppose, for instance, that when Seymour was originally appointed, the committee or secretary of the club said to him: "The committee have absolute powers to let you have the advantage of a benefit match or not just as they please. Their discretion is absolute and unfettered, but if you discharge the duties of your post to their entire satisfaction, they may possibly be inclined to let you have the benefit of such a match. They make no promise whatever to do so." It certainly would appear to me that if that remark or any equivalent remark had been made at the time suggested, it ought to be held that Seymour might naturally and reasonably anticipate that he would have a fair chance of obtaining the benefit of a test match conferred upon him by his employers, if he discharged the duties of his post to their entire satisfaction. A grave injustice might be done to an employee or to his employer by the omission to elicit what took place when the employee was first engaged.

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What were the precise conditions of his employment? Warrington L.J. deals with these points of view in a lengthy passage of his judgment. (1) I quote it in full by reason of its importance, and because I thoroughly concur with it. "Now did this money come to the respondent by virtue of his office? Looking at the regulations, I am satisfied that from that alone one must come to the conclusion that it did come to him by virtue of his office. It is something which obviously was contemplated as a possibility amongst the terms under which he was serving the Kent County Cricket Club, but more than that, it seems to me that this came to him not merely by virtue of his office, because it was something which he might expect to get from his office, but it came to him from his employers, when one comes to think of what really happened. If this match had been held without the exercise by the club of their discretion in this man's favour by making it a benefit match, the gate money would have been the property of the club and would have gone into their coffers. It is quite true that the gate money which would have been taken at the match if it had not been a benefit match may have been less in amount, but that seems to be quite immaterial. They were under no obligation to give the benefit. They were under no obligation to give him any portion of the gate money that day, and it seems to me that by making the match a benefit match, it was their act which gave him the right to receive this gate money. That seems to me to be one extremely important and perhaps the most important factor of all, and it is that fact which distinguishes the gate money from the subscriptions which were gathered outside. As regards those subscriptions, the club never had any interest in them at all. They were, as it seems to me, quite properly treated by the Crown as falling on the other side of the line, and as donations purely personal given by outsiders to the man for whose benefit they were given. That seems to me to be the crucial point in this case, that this was money given to him by the will of his employers and in a manner contemplated by

(1) [1927] 1 K. B. 99.

the actual terms of the employment as shown by the regulations."

The fact that the giving of permission by the committee of the club to the holding of benefit matches is purely voluntary and discretionary is entirely immaterial. In *Herbert* v. *McQuade* (1), Collins M.R. (as he then was) quoted a passage from the judgment of Lord Curriehill in a Scotch case, to the following effect: "It is," said the learned judge, "with some reluctance that I have formed the opinion that the Commissioners are wrong, and that the appellant is liable for income tax on the 100*l.* mentioned in the case. It is true that it is a voluntary contribution by the parishioners, one which they are under no obligation to make and which they may withdraw at any time, but still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes." The Master of the Rolls, in commenting on this judgment, laid down a test in these words: "The test is whether, from the standpoint of the person who receives it" (i.e., the payment), "it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this —that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

This case of *Herbert* v. *McQuade* (1) has been often approved of and followed. It may well be that there is nothing to prevent the Kent County Cricket Club from giving a handsome gift to their professional cricketer, though they knew he was the worst cricketer that ever held a bat or bowled a ball, but these regulations do not appear to me to contemplate such a case. A benefit match permitted in such a man's interest would naturally secure very little money either in

(1) [1902] 2 K. B. 631, 649.

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the shape of subscriptions or gate money. A professional cricketer such as Seymour must have had some special merit to secure such a splendid prize as he obtained in this case. The money of both subscribers and persons who passed the gate was rather lavishly given. It is difficult to imagine what special merit he could have had other than skill and efficiency in the game he was employed by his employer to play, and to teach. It is much to be regretted that Seymour was not examined, not only as to the terms of his employment, but also as to how he regarded this sum of 939*l.* odd, and upon what ground he demanded a return of the income tax paid yearly by his trustees. According to the decision in *Herbert* v. *McQuade* (1) it establishes that the test is whether from the standpoint of the person who receives the money it accrues to him in virtue of his office or employment.

The Master of the Rolls deals with this point in the following passage of his judgment. (2) He said: "But after recounting the facts as I have done and giving consideration to the substance of the matter and bearing in mind the regulations which I have read, it appears to me that this sum of 939*l.* cannot be considered to be an extraneous addition to Seymour's wages or a fortuitous donation, but that it was an addition arranged by and through his employers at a time when they considered that a benefit match should be allowed to him, and was an addition contemplated as a possibility in the course of his employment in the very terms which regulated the employment of their staff, including the respondent. For these reasons it appears to me that this sum of 939*l.* falls within the principle which has been laid down in *Herbert* v. *McQuade* (1) and the other cases, and is taxable just as any other sums are taxable which are received in the course of employment and are profits arising therefrom."

It is not disputed that the effect of these regulations is, according to a well known principle of law, to create in Seymour an absolute ownership in the fund vested in the appointed trustees.

(1) [1902] 2 K. B. 631. (2) [1927] 1 K. B. 97.

The mode in which the trustees discharged their trust affords an indication of how they and their beneficiary must have regarded the fund resulting from the benefit match.

At p. 3 of the stated case it is set forth that the net proceeds of the match, with certain other sums, amounting on the whole to 1492*l.* 8*s.* 7*d.*, were by the Kent County Cricket Club invested in the purchase of the stocks named, that dividends from these investments were received by the county club, less the income tax which was deducted, and were paid to Seymour by cheques drawn by the county club in his favour on October 21, 1921, October 21, 1922, and October 21, 1923, for the respective amounts of 55*l.* 8*s.* 6*d.*, 64*l.* 5*s.* 8*d.* and 67*l.* 12*s.* 2*d.* At p. 4 of the case stated it is set forth that certificates of the deduction of income tax from these sums were furnished to Seymour by the Kent County Cricket Club, and that he, Seymour, claimed for repayment of the income tax deducted on the sums above mentioned. The case of *Herbert* v. *McQuade* (1) and the cases which followed it decided that it was the standpoint of the receiver of the money that determines the liability to income tax. It was essential then that it should be ascertained in what light Seymour regarded these dividends. He is not apparently asked a single question upon the subject.

The judgment of Lord Loreburn in *Blakiston* v. *Cooper* (2) has been frequently referred to. The headnote fairly states what was the pith of the decision. It is there set forth that voluntary Easter offerings given as free gifts to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as profits accruing to him by reason of his office under Sch. E, Income Tax Act, 1842. There was, I think, a disposition during the argument to treat Lord Loreburn's judgment as having laid down a test as to when Easter offerings of this kind would be properly assessable to income tax and when not. I doubt very much if Lord Loreburn intended to lay down any test of the kind. I doubt very much if the alleged test would have been workable, for he said: "Had it been

(1) [1902] 2 K. B. 631. (2) [1909] A. C. 104, 107, 108.

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a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

In the present case no evidence was given to show that Seymour was possessed of anything beyond his skill in cricketing or in the discharge of his professional duties to give him a claim to the benefit of a benefit match, but that skill he was hired to exercise and display in the performance of the duties of his post, and the money he thus secured accrued to him by reason of that, not as far as appears by reason of anything else.

The judgment of Lord Robertson in *Blakiston* v. *Cooper* (1) is well worth a careful perusal on this point. He said: "When the broader facts of the case are remembered, I confess that it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The cause of collecting the money was to supplement the legal income of the vicar, and, while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices."

I think that when no reason is shown for the gift to an official such as Seymour of the large and substantial prize given to him through the medium of a benefit match, it must in reason be assumed that it was given to him for the efficient and satisfactory discharge of the duties he was employed to discharge, and, if so, that the reward which accrued to him came to him from his employment. I am therefore of opinion that the judgment of the Court of Appeal was right and should be affirmed and that this appeal should be dismissed with costs.

LORD PHILLIMORE. My Lords, the result of the assessment having been made upon the appellant as a person holding an office or employment under Sch. E and not upon him in

(1) [1909] A. C. 104.

respect of his professional earnings under Sch. D has been to bring under your Lordships' notice two quite different classes of authorities: those which deal with a public officer receiving some emolument, not from his employers (if indeed he has any), but from persons with whom he has official relations, and those which deal with an employee receiving from his employers some benefit other than and additional to his contractual salary. The conditions of these two classes of case seem to me so different that very little assistance can be derived in one case from the decisions applicable to the other.

The reported cases dealing with a public officer which have been brought to your Lordships' notice are cases concerning ministers of religion. It is suggested that at any rate from these cases it can be deduced that a perquisite or profit of office is none the less a perquisite or profit because the emolument bestowed is voluntary. I doubt whether the analogy can even be carried so far. In these religious cases the offering may be voluntary, but it is not spontaneous. In the Easter offering case (*Cooper* v. *Blakiston* (1)) the moral or religious duty to make the offering was inculcated by the bishop, and, as pointed out in the judgment of your Lordships' House, ecclesiastical machinery was set in motion to procure it.

Nor does the matter rest here. For a portion of the collection definite legal acts were required to effect the purpose. The collection at the offertory in the Communion Service is provided for by rubric, and by another rubric this offertory is to be disposed of "to such pious and charitable uses, as the minister and churchwardens shall think fit, wherein if they disagree, it shall be disposed of as the ordinary shall appoint." Moreover, though the Easter offerings collected on the occasion in question were not the fruits of legal compulsion, they did represent and supersede in respect of some of the contributions a legal due. The rubric preceding the one I have just quoted, says as follows: "Yearly at Easter every parishioner shall reckon with the parson, vicar

(1) [1909] A. C. 104.

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or curate, or his or their deputy or deputies; and pay to them or him all ecclesiastical duties, accustomably due, then and at that time to be paid." Easter offerings or Easter dues are due of common right from the householder for every member of his family of sixteen years of age and upwards. True it is that the common law rate is 2*d.* per head only, though by custom it may be more. It is, I believe, not uncommon, though at the moment I cannot think of an instance, and probably was more common when more offices were paid by fees than are so endowed now, that there should be a legal fee of small amount which it was usual to augment. Such fees of office are intended to be covered by the words of Sch. E as profits or perquisites. Easter offerings along with mortuaries and surplice fees are dealt with as part of the legal income of the clergy by the Tithes Commutation Acts, the first (6 & 7 Will. 4, c. 71, s. 90) providing that a parochial agreement shall not extend to their commutation, while a later Act (2 & 3 Vict. c. 62, s. 9) allows them to be included in a parochial agreement. They are also dealt with in the New Parishes Act (6 & 7 Vict. c. 37, s. 15).

The case of *Herbert* v. *McQuade* (1) has not the authority of your Lordships' House. But if it be taken to be law it was a case where, though the particular incumbent had no title to the annual grant, the annual income of the fund had to be distributed among selected incumbents of his class. In that case, too, there was an element of periodicity.

In fact, in these cases of ministers of religion there is always, I think, some element of periodicity or recurrence which makes another distinction between them and the cases of a single gift by an employer or employers. If they be put aside, little is left in the way of authority on which the Crown can rely except that in the case of *Cowan* v. *Seymour* (2) the Court of Appeal thought it important to point out that the gift to the liquidator did not come from his employer, the incorporated company, but from the several shareholders who in combination made up the company.

(1) [1901] 2 K. B. 761; [1902] 2 K. B. 631.

(2) [1920] 1 K. B. 500, 509.

My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Sch. E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service.

During the course of the argument, however, a subtler consideration seemed to emerge. It was suggested that the hope or chance of a benefit match was part of the inducement to a man to become a professional cricketer in the service of the Kent County Cricket Club, and I suppose it must be put as one of the terms under which he was engaged. This line of argument is a departure from that hitherto put forward by the Crown. On the part of the Crown it has been accepted that the grant of the benefit match was voluntary; and the whole weight of the contention has been, that though voluntary, it was still a profit or perquisite. Anyhow the materials for this contention are wanting. The case stated by the Commissioners does not find any facts to support it. The contentions on behalf of Seymour were either that the money which he received came from the general public and not from his employers or that if it came from his employers, it was to be treated as a donation or gift, and the Commissioners accepted these contentions. If it had been otherwise, a number of facts ought to have been found which we have not before us. The case would probably have stated the number of benefit matches which were usually held yearly, the number of professional cricketers in the service of the club, the usual duration of the tenure of office, or at least the percentage of cricketers in the service of the club who got benefit matches; and I think it would be defective if it did not state that the expectancy of such a benefit was part of the inducement to Seymour to take his post. I am not sure that it would not be necessary to find further that this inducement was held out to him by his employers. The case does not, either in its narrative or in its extracts from the regulations of the club, show that there

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is any provision in the rules for granting benefit matches. All that it shows is that there are such matches of sufficient frequency to make it desirable to frame rules as to the distribution of the proceeds of such matches when they occur.

In my judgment this is a case of a plain gift not taxable as a profit or perquisite of employment, and I think that this appeal should be allowed.

LORD CARSON. My Lords, I concur with the motion proposed by the Lord Chancellor.

In each case it is important that the words of the rule should be kept prominently in mind. They are plain words, of no technical import, and, in my opinion, no previous authorities can assist, as each case must depend upon the particular facts proved.

In the present case the Commissioners were, in my opinion, fully entitled to decide as a question of fact that the sum in question was not wages or perquisites or profits accruing by reason of the employment of the appellant. In fact the money was never, in my opinion, the money of the club at all, but was subscribed by the public for the benefit of the appellant.

Speaking for myself alone, although, of course, the respondent was acting within his rights in the course this litigation has taken, I cannot help thinking that the case might well have been allowed to rest after the determination of the question by the Commissioners and Rowlatt J. Protracted litigation, whilst easy sailing for the Revenue, is a great burden on the subject in a case where, so far as I can see, no question of principle was involved. I hope the appellant will be fully indemnified against costs.

Order of the Court of Appeal reversed, and order of Rowlatt J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause

remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 24, 1927.

Solicitors for the appellant: *Halsey, Lightly & Hemsley.*

Solicitor for the respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

HARNETT . . . . . APPELLANT;

AND

FISHER . . . . . RESPONDENT.

H. L. (E.)* 1927 *May* 27.

Lunacy—Medical Certificate—Action for Negligence in signing Certificate—Neglect in execution of Act of Parliament—Statutes of Limitation—Disabilities—Non compos mentis—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *ss.* 3, 7—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 330, 331—*Public Authorities Protection Act*, 1893 (56 *& 57 Vict. c.* 61), *ss.* 1, 2 *and Schedule.*

The respondent, a country doctor, signed a certificate in the form required by the Lunacy Act, 1890, to the effect that the appellant was of unsound mind and a proper person to be detained under care and treatment. Under a reception order made on the same day the appellant was received in a licensed house as a person of unsound mind and remained under detention for nearly nine years, after which he escaped. Seven months after his escape the appellant commenced this action against the respondent for negligence in certifying him to be insane. The respondent relied on ss. 330 and 331 of the Lunacy Act, 1890, and he also pleaded the Limitation Act, 1623, as a bar to the action. At the trial the jury found that at the date of the certificate the appellant was not of unsound mind, and that the respondent did not act with reasonable care, and assessed the damages. The judge entered judgment for the respondent on the ground that the action was barred by the Act of 1623, and his judgment was affirmed by the Court of Appeal.

In the House of Lords the question was raised whether the appropriate Limitation Act was not the Public Authorities Protection Act, 1893, by which s. 331 of the Lunacy Act, 1890, had been repealed:—

Held by Viscount Sumner, Lord Atkinson, Lord Wrenbury and Lord Carson; Lord Blanesburgh dissenting, that the action was not

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* *Present:* Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson, and Lord Blanesburgh.

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an action for neglect in the execution of an Act of Parliament, but was an action on the case for negligence in examining into the appellant's mental state, and that the Limitation Act, 1623, applied; and further by all their Lordships, that, in the face of the finding of the jury, the appellant could not maintain that he was non compos mentis during his detention within the disability section of that Act, and that consequently the six years ran from the date of the certificate.

Held by Lord Blanesburgh that this was an action for a breach of duty owed to the appellant under the Lunacy Act, 1890; that until the repeal of s. 331 by the Public Authorities Protection Act, 1893, that section prescribed the only period of limitation to which the action was subject, that the only effect of the repeal was to shorten the period within which such an action could be brought, in the case of a plaintiff who had been detained as a lunatic, from twelve months to six months after his release, and that on this ground alone the action was out of time.

Decision of the Court of Appeal [1927] 1 K. B. 402. affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Warrington and Scrutton L.JJ.) affirming a judgment of Horridge J. (1)

The facts sufficiently appear from the opinion of Viscount Sumner and are summarized in the headnote.

The pleadings are fully set out in the opinion of Lord Atkinson.

The facts relating to the appellant's detention are set out in the report of *Harnett* v. *Bond*. (1)

1927. Feb. 28; March 1, 3. The appellant in person. The plea that the action is barred by the Statute of Limitations fails on several grounds. (1.) I was under the disability of non compos mentis within the meaning of s. 7 of the statute of James from November 10, 1912, when my cause of action accrued, until October 15, 1921, when I regained my freedom. The question of non compos mentis in this connection is one of law rather than of fact. Although in 1912 I was in fact sane I had the legal status of a lunatic, and, as I suffered all the disabilities of that status, so also I was entitled to all the privileges. Although I was always anxious to bring the matter into Court, I was prevented from communicating with my solicitors and taking legal proceedings. I was de facto precisely in the same position as if I had been

(1) [1925] A. C. 669.

really a lunatic. This is illustrated by the decision of your Lordships' House in *Harnett* v. *Bond* (1), which raised a question as to the effect of the order for leave of absence, under which I left the house of Dr. Adam, in whose charge I then was, on December 12, 1912. That order empowered Dr. Adam to take me back before the expiration of my leave if my mental condition required it. That, it was contended, meant if my mental condition in fact required it, and, as the jury had found that I was in fact sane at the time, it followed that my mental condition did not require it; but the Lord Chancellor expressly rejected that argument and held that the medical officer in whom the power to retake was vested was the judge of that question. If the construction of the statute for which I am contending is not correct, the result is that if a sane man is detained as a lunatic for a sufficiently long period he is deprived of all remedy.

(2.) The next ground is estoppel. The respondent cannot now be heard to say that I was not a lunatic, because both in his certificate and in his evidence at the trial he has maintained the contrary. I, a Kentish farmer, have been placed in an embarrassing position by the action of the respondent and I could not use my faculties in the same way as I might otherwise have done: *Bloomenthal* v. *Ford* (2); *North Eastern Ry. Co.* v. *Wanless* (3); *In re Electric Telegraph Company of Ireland.* (4)

(3.) My next point is restraint. Time did not run against me while I was under detention: *Stedman* v. *Hart.* (5) I was impeded in my action by circumstances over which I had no control. Sect. 82 of the Lunacy Act, 1890, shows that the Legislature did not contemplate that a person detained as a lunatic could bring an action during his detention. Time would not run against me until I knew the facts, but I never saw the certificate drawn up by the respondent until 1921 when I was free, nor was I able to discover the grounds

(1) [1925] A. C. 669, 684.
(2) [1897] A. C. 156.
(3) (1874) L. R. 7 H. L. 12, 16.
(4) (1860) 2 D. F. & J. 275, 295, 300–1.
(5) (1854) Kay, 607, 611.

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on which I was certified to be insane: *Molloy* v. *Mutual Reserve Life Insurance Co.* (1) It may be objected that I might have taken proceedings when I was out on leave in 1912, but such proceedings would have been stayed, because the action must have been brought by a next friend and I had no one whom I could ask to be my next friend. My brother would not help me as it was on his petition that I was detained as a lunatic; nor would my wife, who was appointed receiver of my property, as she wanted to get me certified; nor would Dr. Adam, at whose house I was detained, for he refused to forward a letter which I had written to my solicitor. If I had issued a writ I could not have put in a statement of claim for I had never seen the certificate. Indeed, I should have been taken back to the asylum. It is contrary to the intention of the Legislature that I should be deprived of my legal rights without any fault of mine. There is ample justification for giving judgment in my favour on grounds both of law and of moral justice. This House will be slow to apply the statute to defeat an honest claim: *Boatwright* v. *Boatwright.* (2) [He also referred to *In re Newbegin's Estate* (3); *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (4); *Selig* v. *Lion* (5); *In re Watson* (6); *Gregory* v. *Hurrill* (7); *In re Sharpe.* (8)] If I have made out a prima facie case for saying that the Statute of Limitations does not apply I propose to deal with two other contentions raised by the respondent: (1.) that he owed no duty to me to exercise reasonable care, and (2.) that the detention was due to the independent order of the justice, and not to the certificate. On both these points the Courts below have decided in my favour.

[The respondent did not now persist in contention (1.).

Neilson K.C. (with him *T. Carthew*) for the respondent (after expressing his appreciation of the moderation and restraint with which the appellant had conducted his case).

(1) (1906) 22 Times L. R. 525.
(2) (1873) L. R. 17 Eq. 71, 74.
(3) (1887) 36 Ch. D. 477.
(4) (1890) 25 Q. B. D. 377.
(5) [1891] 1 Q. B. 513.
(6) [1899] 1 Ch. 72.
(7) (1826) 5 B. & C. 341.
(8) [1892] 1 Ch. 154.

The question turns ultimately upon the construction of the Limitation Act, 1623. [Lord Blanesburgh suggested that that Act had nothing to do with the matter. Sect. 331 of the Lunacy Act, 1890, prescribed a special period of limitation in the case of an action brought under s. 330, and that period was twelve months after release. On that hypothesis the appellant's action was not out of time, as it was brought seven months after he had regained his liberty. It was true that that section was repealed by the Public Authorities Protection Act, 1893, but there was a question as to the extent of that repeal: Halsbury's Laws of England, vol. xix., para. 365, p. 176. Assuming that the repeal operated, the Public Authorities Protection Act, 1893, prescribed a special limitation of six months, but it had been held that that Act required to be pleaded, and that the respondent had not done.]

[Counsel then formally applied to make the necessary amendment, and, their Lordships having intimated that in the circumstances they would be disposed to grant leave to amend on terms, the argument proceeded on that footing.] Assuming that the question turns upon the construction of the Act of 1893, that Act expressly repeals s. 331 of the Act of 1890. The act complained of by the appellant was clearly an act done in pursuance, or execution, or intended execution of an Act of Parliament and on any view of the Act of 1893 this action was out of time. The certificate only came into existence for the purpose of the reception order and was something done in execution of the statute. *Kent County Council* v. *Folkestone Corporation* (1) and *Tilling* v. *Dick, Kerr & Co.* (2) are distinguishable, because the act there complained of was not done in pursuance of a statutory or public duty. Alternatively, this is a pure action for negligence. The certificate was given in performance of the respondent's duty as a private practitioner in respect of a private patient, and if the cause of action is not under s. 330 of the Act of 1890 no reference to that section in the defence can alter the cause of action. The cause of

(1) [1905] 1 K. B. 620. (2) [1905] 1 K. B. 562.

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action is simply negligence. "Reasonable care" happens to be the term used in the statute, but want of reasonable care is the common way of describing negligence. There is no distinction between this kind of action and any other kind of action for breach of duty, and nowhere is there anything to suggest that the Statute of James has been repealed. Lastly, it was not the giving of the certificate which caused the appellant's detention, but the order of the justice. That was the view of Lord Reading in *Everett* v. *Griffiths*. (1) That view was founded upon *Thompson* v. *Schmidt* (2) and was accepted by Scrutton L.J. It is true that when *Everett* v. *Griffiths* was before this House Viscount Finlay expressed his disapproval of that view, but the decisions of the Courts below were affirmed on other grounds and his observations were obiter only. In the respondent's submission it was the act of the justice which brought about the appellant's detention.

The appellant replied.

The House took time for consideration.

1927. May 27. VISCOUNT SUMNER. My Lords, the respondent, a country doctor in Kent, was asked by another doctor, an old friend of his, to examine his patient, the present appellant, with a view to certifying his opinion of his mental state, and the respondent consented to do so. From a window he watched the appellant for a short time in the street and took note of his demeanour, and subsequently he made an attempt to get into conversation with him. In the result he signed a certificate in the form required by the Lunacy Act, 1890, in which he pronounced the appellant to be of unsound mind. The appellant's brother, who presented the necessary petition for a reception order, took this certificate and that of the other doctor before mentioned to a justice of the peace, who thereupon made the order and the appellant was placed in confinement as a person

(1) The Times of Nov. 21, 1919; (H. L.) [1921] 1 A. C. 631, 667. (C. A.) [1920] 3 K. B. 163, 192; (2) (1891) 56 J. P. 212.

of unsound mind not so found by inquisition. All this happened on November 10, 1912.

Although on some subsequent occasions the appellant regained his liberty to a limited extent, he remained under detention till October 15, 1921, when he made his escape and remained at large till a sufficient period had elapsed to prevent his being again detained without further certification and a further order. From that time he has been at liberty. On his application the Master in Lunacy on December 12, 1921, discharged the receivership order over his property and income, which had been made on July 17, 1913, and on May 31, 1922, he began the present action against the respondent.

The statement of claim alleged negligence as a medical man in connection with the examination and the certificate, and claimed damages resulting therefrom in respect of the entire period of almost nine years' detention. Negligence was alleged under two separate heads: (1.) an inadequate examination, made without due care, and after perfunctory and momentary observations of the plaintiff's demeanour; and (2.) certification without due consideration and on insufficient grounds and an incorrect recital in the certificate of the facts, which he purported to have observed himself. This latter allegation really meant that the facts stated in the certificate were not true, not that it did not correctly set out what the respondent alleged that he had in fact observed. No point appears to have been made at the trial, that the respondent had been careless in the wording of the certificate, as distinguished from carelessness in ascertaining the grounds for it.

The original defence, in addition to traverses, relied specifically on ss. 330 and 331 of the Lunacy Act, 1890. A formal amendment three years later pleaded 21 Jac. 1, c. 16. An informal notice of reply was subsequently given by the plaintiff alleging (*a*) that during the period of his detention he was, within the contemplation of that Act, non compos mentis or was to be treated as such in law and in fact under the circumstances alleged in the statement of claim, and

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(*b*) that the defendant, whose certificate had caused his prolonged detention, ought not to be heard to allege that the claim was barred by lapse of time or that the plaintiff was compos mentis on November 10, 1912.

On these pleadings the cause went to trial before Horridge J. and a special jury in Middlesex, and in answer to the learned judge's questions the jury found as follows: Was the plaintiff of unsound mind on November 10, 1912 ? No. Did the defendant act with reasonable care ? No. Damages 500*l*. No question was put as to the good faith referred to in s. 330 of the Lunacy Act, 1890. Thereupon judgment was entered for the defendant on the ground that the action was statute barred under the Act of 1623, but the verdict has not been challenged. The Court of Appeal unanimously affirmed this judgment. Hence this appeal.

My Lords, the respondent has not for present purposes disputed that a cause of action would arise at common law as for breach of duty towards the appellant, if the respondent was actually wanting in reasonable care in his examination and in forming his conclusion as to the appellant's state of mind. I need therefore express no opinion on this question.

The ground of the decision of both Courts below may be tersely put thus. The jury found conclusively that on the day of the examination the appellant was of sound mind, and he is not shown ever to have been otherwise. If, then, the appellant never has been non compos mentis he could not bring himself within the disability section (s. 7) of the statute of James, and the period of six years ran from November 10, 1912. He cannot be allowed to blow hot and cold and to say, for the purpose of getting the verdict and damages, that he was sane all along, and yet, for the purpose of meeting the plea of the statute, that he must nevertheless be deemed to have been insane so as to prevent time from running.

My Lords, the appellant, who appeared at your Lordships' Bar in person, not only conducted himself with great propriety and moderation, but laid his legal argument before your Lordships in a way, which was equally of assistance

to your Lordships and to his own case. He said briefly, that under the Lunacy Act and for its purposes, he was made a lunatic and treated in person and property accordingly, and that for any purpose of bringing the present action he was in fact to all intents as much disabled as if he had been non compos mentis. As a practical matter it would have been impossible for him to have begun his action till after he had made his escape. On a "liberal" construction, the statute should be read as bringing this state of things within the disability section.

To this I am afraid I must say, as was said by both Courts below, that the Act does not say so, and cannot be made to say so, without wresting it from its language in a way that is not permitted to us. The object of the Act is to protect defendants against belated claims, not merely those defendants, who have a good defence and to that extent need no protection, but those also, who have not or who, owing to lapse of time, can no longer count on making out a sufficient answer: *Perry* v. *Jackson* (1); *A'Court* v. *Cross* (2); *Tolson* v. *Kaye.* (3) The present action is an action on the case, and being within the Act is prima facie statute barred, unless the appellant can bring himself within the only words in the disability section, which touch him—namely, non compos mentis. What those plain words mean is further shown, if that be necessary, by the words used to express the opposite state—namely, "of sound memory." They describe an actual mental condition, which the jury's word "sane" negatives, and not a treatment imposed or a disability suffered, because the plaintiff has been wrongly supposed to be in that mental state, by whosesoever fault, even that of the defendant himself, this may have been brought about. On one occasion, about a month after the reception order was made, the appellant was allowed to leave the asylum provisionally and was actually at large for some two days, and after his return there he was in frequent communication with his solicitor and occasionally

(1) (1792) 4 T. R. 516, 519. (2) (1825) 3 Bing. 329, 332.
(3) (1822) 3 Brod. & B. 217, 222.

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saw him personally. I think, however, that one may accept the statement, that even the issue of a writ against the respondent was beyond his power, much as it would have been if, though sane, he had been bedridden and in poverty, but in the latter case no one could doubt that his disability was not one of those named in the section. Neither will it do, if he was called insane, when he was really sane. The question is not, as the appellant put it, of the status of a lunatic, imposed on him after the making of the reception order, but of his mental condition of sanity or insanity, and this has been finally disposed of in his favour by the verdict. I am not concerned to justify what the Legislature has enacted or to regret that it has gone no further to assist persons in the appellant's position. I therefore agree entirely with the conclusion of the Court of Appeal.

After the appellant had concluded his argument a question was raised by one of your Lordships, which, though it had not been raised before either here or below, is of much importance. It was whether the right statutory limitation had been relied on. The Lunacy Act of 1890 provided in s. 331 that any action, brought by any person who has been detained as a lunatic, against any person for anything done under the Act, must be brought within twelve months after the detained person's release. If this is the Act which applies, the action was brought in time. This section, however, is included in the schedule of repeals attached to the Public Authorities Protection Act, 1893. A question has been raised, but not I think decided, as to the extent to which this repeal goes, and it is said that, although the terms of the Act of 1893 seem at first sight to provide for an absolute repeal, the true reading of it is that s. 331 is kept alive for the purpose of claims against persons, who are within s. 331 but are not among those protected by the Act of 1893. In that case, assuming that these later limitation sections would preclude the application of the general Act, either s. 331 remains in force and this action was begun within time, or, if the defendant is within the ambit of the Act of 1893, the limitation which it contains, dating as it does from the time

when the cause of action accrued, would not be available to protect the respondent, because that Act had not been pleaded.

I think it was the opinion of all your Lordships that leave to amend by pleading the Act of 1893 ought to be granted to the respondent under the circumstances, the only question to be settled now being that of the terms, if any, to be imposed, if it were necessary to hold that the defendant was within the protection of the Act of 1893, in so far as he was sued for any act done in pursuance of the Lunacy Act, 1890, or in respect of any neglect in the execution of that Act or of any public duty, but the question would further arise how far, if at all, is he thus sued in these proceedings ?

I am strongly of opinion that no terms should be imposed as a condition of the grant of this leave. By s. 1 (*b*) of the Public Authorities Protection Act a successful defendant is entitled as of right to costs of the action as between solicitor and client. It seems to me that the defendant is not more in fault in overlooking the Act of 1893 than his opponent. They were in equal ignorance, and not they alone. Nobody thought of this point at all. In the case of limitation sections, passed for the protection of defendants, it ought not to be presumed that a second provision constitutes an implied repeal of the first pro tanto, unless their respective terms are inconsistent with one another, and a limitation to twelve months from the alleged lunatic's restoration to liberty is not inconsistent with a term of six years from his first detention. As to the Act of 1893, the question is, whether the defendant was acting under it at all. If, which I should not concede without hearing argument on the point, the language and purpose of the Act of 1893 or that of 1890, require that the periods of limitation there given are to be substituted for and are exclusive of those given in the statute of James, I think that the plaintiff, instead of arguing the statute of James from Court to Court, ought to have contended at the outset that it did not apply, and that the defendant's choice lay between an Act, which did not help him, and an Act, which he had not pleaded. Other terms

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as to leave to amend might then have been timely and fair. I think it is enough, if, so far as leave to amend is concerned, the result remains the same, as if the Act of 1893 had not been brought into the discussion. After all, the defendant has not had the chance of getting solicitor and client costs at the trial.

It appears to me, however, that no amendment is needed, because it really is the statute of James that applies to this case. What is the action to which the Act of 1893 applies ? It is one brought for doing or neglecting to do an act under any statute of the kind described, in this case the Lunacy Act. As far as the present action is concerned the only such act is signing the certificate in the prescribed form. When, however, we look at the statement of claim and still more at the substance of the case as proved at the trial and since alleged on two appeals, the gist of the action is not the signing of the prescribed form of certificate but the lack of care in examining into the appellant's mental state and in forming an adverse opinion about it. The negligence, for which the action was brought, could only arise in this connection. The claim was not for breach of a statutory but of a common law duty. Negligence as a medical practitioner acting in the course of his private practice is what is charged against the respondent.

Any principle on which this cause of action could be sustained, would be equally applicable if the defendant had signed nothing but had given his opinion to the magistrate orally. The rest is either a separate cause of action under the Lunacy Act, for which no damage could be recovered since the detention order was the order of the justice and not of the doctor, or is a mere item in the damages claimed for the negligence. It may be that in view of s. 317, sub-s. 2, of the Lunacy Act, 1890, the proceedings to be taken in case of mis-statements made in medical certificates under the Act are criminal proceedings only. In my opinion the present cause of action being on the case for an alleged common law breach of duty, the statute of James was the statute applicable. I think that, whether the pleadings are

amended on the terms I suggest or not at all, this appeal ought to be dismissed with costs.

LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal, England, dismissing an appeal by the present appellant against a judgment dated April 27, 1926, ordering that verdict and judgment be entered for the present respondent. The appellant is a farmer, fruit and hop grower, residing at Baroona, 19 Vale Road, Balham. The respondent is a duly qualified medical man who has for many years practised at Sittingbourne in the county of Kent. The appellant in his case sets forth his grievance and his alleged cause of action against the respondent in the following terms :—

" 3. The writ in the action was issued on May 31, 1922, claiming damages against the respondent for negligence in certifying the appellant to be a lunatic and a proper person to be taken charge of and detained under care and treatment.

" 4. By his statement of claim delivered July 12, 1922, the appellant alleged :—

" (*a*) That on November 10, 1912, his brother Arthur Harnett presented a petition to one R. G. E. Locke, a justice of the peace for the county of Kent, for an order for the reception of the appellant as a person of unsound mind into the licensed house of one Dr. G. H. Adam, at West Malling, Kent.

" (*b*) That the said petition was accompanied by a medical certificate made by the respondent in his capacity as a medical practitioner in which he alleged that he had personally examined the appellant and come to the conclusion that he was a lunatic and a proper person to be taken charge of and detained under care and treatment.

" (*c*) That by the said certificate the respondent had formed such conclusions on the facts and grounds therein set forth.

" (*d*) That the facts and grounds alleged in the said certificate were inaccurate in the respects set forth in para. 4 of the statement of claim.

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"(*e*) That the said petition was also accompanied by a medical certificate made by Dr. F. W. H. Penfold, since deceased.

"(*f*) That on the same day, November 10, 1912, the said R. G. E. Locke made an order upon the said petition accompanied by the said certificates authorizing the said Dr. G. H. Adam to receive the appellant as a patient into his said licensed house.

"(*g*) That the same day, November 10, 1912, the appellant was received under the said order at Dr. Adam's said licensed house and thereunder there detained from November 10, 1912, until February 22, 1913, and thereafter detained under the said order at divers asylums and places registered or licensed for the reception of lunatics (more particularly specified in para. 8 of the statement of claim) until October 15, 1921, when he escaped."

The appellant is entirely in error in supposing that he was after February 22, 1913, detained in any asylum under the authority of the order of November 10, 1912. His subsequent detention was, by the House of Lords, held to have taken place under proceedings with which neither Dr. Adam nor the respondent were connected, or for which they both or either of them are or is responsible.

The appellant proceeds to aver: "(*h*) That the respondent in making his said medical certificate was negligent and acted without reasonable care in the respects set forth in para. 9 of the statement of claim."

In para. 9 of the statement of claim referred to the tort for which the appellant sues the respondent is described as follows: "9. The defendant in making the said medical certificate acted without reasonable care in the respects following. There was no real examination of the plaintiff by the defendant for the purposes of the said certificate at all; the examination alleged by the defendant in the said certificate was momentary, perfunctory and a sham. The grounds upon which the defendant made his said certificate were entirely insufficient and the defendant gave the said certificate without proper consideration as to the sufficiency

of the said grounds. Further the defendant gave the said certificate upon grounds which so far as they relate to facts indicating insanity observed by the defendant at the time of the alleged examination amount to nothing at all."

On October 13, 1922, the respondent delivered his defence. He admitted paras. 1, 2, 3 and 6 of the statement of claim, alleged that the facts stated in para. 4 were inaccurately set forth, and made no admission as to the allegations contained in paras. 7 and 8. As to para. 9 of the statement of claim he denied the allegation of fact therein contained and avers that in all the matters therein referred to he acted with good faith and with reasonable care and in pursuance of the provisions of 35 Vict. c. 5. He further states that he will at the trial of the action rely on s. 330, sub-s. 1, and s. 331 of that said statute. The respondent admits that the appellant was detained as a lunatic, but denies that the detention was at the places or for the periods referred to in para. 10 of the statement of claim, and further denies that such detention was due to any negligence on his part.

On December 15, 1925, the respondent, pursuant to an order of that date, amended his defence by adding the following paragraph :—

" The plaintiff's alleged right and/or rights of action did not accrue, if at all, within six years next before the commencement of this action, and was and/or were barred by the Limitation Act, 1623, 21 Jac. 1, c. 16."

On March 3, 1926, the appellant's solicitor, Mr. Harry Coulson, wrote to the respondent's solicitors, Messrs. Le Brasseur & Oakley, a letter, informing them that as there had not been time to file a reply to the new defence it was the appellant's intention to apply to the judge at the trial for leave to contend by way of reply to the amended defence :—

" (*a*) That at the time of the accrual of the plaintiff's cause of action herein and until October 15, 1921, he was, within the contemplation of the statute 21 Jac. 1, c. 16, non compos mentis or to be treated as such in law and in fact, having regard to the matters pleaded in the statement of claim, and

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"(*b*) That for the purpose of his said plea of the said Statute of Limitations, the defendant, by reason of the matters pleaded in the statement of claim, can not be heard to say that the plaintiff was compos mentis on November 10, 1912, when the said certificate was given by the defendant, the said reception order was made by the said Locke and/or the plaintiff was received into the said licensed house of the said Dr. G. H. Adam and/or between the said November 10, 1912, and October 15, 1921."

In para. 9 of the appellant's case it is stated that at the trial the appellant through his counsel agreed to confine his claim for damages for negligence to the period from November 10, 1912, to the time the plaintiff was received and detained by Dr. G. H. Adam at Malling West. The action was tried before Horridge J. and a special jury for several days in the month of July, 1926. The learned judge left the three following questions to the jury:—

"(1.) Was the plaintiff of unsound mind on November 10, 1912?" to which they answered, "No."

"(2.) Did the defendant act with reasonable care?" to which the jury also answered, "No."

"(3.) What damages, if any?" and they answered "500*l*."

The respondent does not seek to have that verdict set aside.

Thereupon the learned judge directed a verdict and judgment to be entered for the respondent on the ground that the Limitation Act, 21 Jac. 1, c. 16, was good defence at law.

The Court of Appeal unanimously held that the appellant's action in this case fell within the third section of the statute of James I., which definitely provides that such an action is barred after the lapse of six years from the accrual of the cause of action. The cause of action in this case admittedly accrued on November 10, 1912. And the action in respect of it was not instituted till May 31, 1922, ten years afterwards. It is unnecessary to set out the words of the statute.

The appellant contends, however, that, notwithstanding that the jury have found that he was, on November 10, 1912, of sane mind, and have awarded him 500*l*. damages in respect

of the detention he has suffered owing to the negligence of the defendant in giving a certificate to the effect that he was insane, he was in fact non compos mentis during the whole time from November 10, 1912, till October 15, 1921, when he regained his liberty; and that therefore the time limit of six years only ran against him from the latter date. The Court of Appeal, without calling on counsel for the respondent, dismissed the appeal. They varied the judgment of Horridge J. on the question of the costs of those issues on which the appellant had succeeded. On this no point arises in the present appeal, and in all other respects they affirmed Horridge J.'s decision. Their Lordships concur with the Court of Appeal. They think their decision was perfectly sound and right on the question raised before them. During the progress of the hearing in this House, however, attention was called by one of its members to the question of the possible application of the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), to certain provisions of the Lunacy Act of 1890, c. 5, affecting in some respects its administration. This is a matter of such importance that I think it should be dealt with. The former of these statutes is entitled: "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

The first section runs as follows: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." The final clause of this section enacts: "This section shall not affect any proceedings by any department

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of the Government against any local authority or officer of a local authority."

By s. 2 it is enacted: "There shall be repealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies—(*a*) the proceeding is to be commenced in any particular place; or (*b*) the proceeding is to be commenced within any particular time; . . . . and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned." The Act of 21 Jac. 1, c. 16, is not mentioned in this schedule. The Lunacy Act of 1890 is mentioned in it, but s. 331 of that Act alone is repealed and the repealed section only provided that any action brought by any person who has been detained as a lunatic against any person for anything done under that Act shall be commenced within twelve months next after the release of the party bringing the action. This section would not apply to the appellant even if not repealed, as he was not released from Dr. Adam's licensed house where he was detained, but from which he escaped.

The aim and proper construction of this Act of 1893 has been many times considered and ruled upon by this House and many other legal tribunals both in England and Scotland. One point has been definitely established, that the statute does not necessarily apply to all the acts of public companies, corporations, or quasi legislative bodies which are intra vires. In the case of *Bradford Corporation* v. *Myers* (1) the construction of the statute was most carefully considered, and a great number of cases reviewed. There the corporation, a municipal body, were authorized by Act of Parliament to carry on the undertaking of a gas company, bound to supply gas to the inhabitants of their district, and empowered to sell coke produced in the manufacture of the gas. The defendants contracted to sell and deliver to the plaintiff a ton of coke. By the negligence of the corporation's agent the coke was shot through the shop window of the purchaser. More than six months after this accident the purchaser

(1) [1916] 1 A. C. 242.

commenced an action against the corporation for negligence. The Court of Appeal held that the corporation were not entitled to the protection they claimed. They then appealed to this House.

Lord Buckmaster, then Lord Chancellor, in delivering judgment, after expressing rather scanty approval of the ground of decision in the case of *Sharpington* v. *Fulham Guardians* (1), which excluded an action for breach of contract from the protection of this statute, in a clear, pithy and pregnant passage of his judgment, described the nature and character of the acts the statute was designed to protect, and said (2): "While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied; nor had any member of the public the right to require the local authority to contract with him. The act complained of arose because one of the servants of the appellants, acting

(1) [1904] 2 Ch. 449. (2) [1916] 1 A. C. 247.

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in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by his personal negligence. In my opinion an action for such negligence is not within the class of action contemplated by the statute."

To the same effect are *Clarke* v. *St. Helens Borough Council* (1) and *Edwards* v. *Metropolitan Water Board.* (2) An effort was made to distinguish this case from the case of *Bradford Corporation* v. *Myers* (3), which I do not think was very successful.

I now turn to the provisions of the Lunacy Act of 1890, for the purpose of considering the nature, scope and aim of those of its provisions dealing with the proceeding of which the appellant was the subject.

It may well be that a medical man who treats a patient, or purports to express an opinion on that patient's bodily or mental state of health, is bound to do the work he has undertaken to do with reasonable care and skill. In this case it was alleged by the appellant and found by the jury that the respondent was guilty of negligence in giving a certain certificate, dated November 10, 1912, pursuant to the provisions of s. 4 of the Lunacy Act, 1890, upon which, coupled with a similar certificate of the same date given by Dr. Penfold, since deceased, both accompanying a petition presented to Richard Good Edward Leonard Locke, the justice of the peace for the county of Kent specially appointed as the judicial authority under s. 6, sub-s. 1, of the Lunacy Act, 1890, the latter gentleman made an order authorizing Dr. G. D. Adam to receive the appellant as a patient in his licensed house at Malling. This order contains a declaration by the said R. G. E. Locke to the effect that he had personally seen the appellant before making the order.

Well, negligence is a breach of duty, but the question is to whom is this duty to use reasonable skill and care owed.

(1) (1915) 85 L. J. (K. B.) 17. (2) [1922] 1 K. B. 291.
(3) [1916] 1 A. C. 242.

This action is founded on the assumption that it was owed to the appellant. The additional question is whether it was owed to any other person or body, and if so, to whom or what authority is the alleged act of the defendant in abstaining from exercising due and reasonable skill and care in granting his certificate, an act done in pursuance or execution or intended execution of an Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of such Act (i.e., any Act of Parliament), duty or authority. These words must, I think, bear the meaning attributed to them by Lord Buckmaster in *Bradford Corporation* v. *Myers*. (1) The language of the Act does not cover all the acts which a local authority has power to perform. It is because the act is one which is either an act in the direct execution of a statute or in discharge of a public duty or in the exercise of a public authority that it is covered.

By s. 4, sub-s. 1, of the Lunacy Act of 1890 it is enacted that, in a case such as this, "a person, not being a pauper or a lunatic so found by inquisition, shall not be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made by the judicial authority hereinafter mentioned." By sub-s. 2, "the order shall be obtained upon a private application by petition accompanied by a statement of particulars and by two medical certificates on separate sheets of paper." The statement of particulars accompanying the petition is in this case very full and convincing.

"Upon the presentation of the petition" (s. 6) "the judicial authority shall consider the allegations in the petition and statement of particulars, and the evidence of lunacy appearing by the medical certificates, and whether it is necessary for him personally to see and examine the alleged lunatic; and, if he is satisfied that an order may properly be made forthwith, he may make the same accordingly; or, if not so satisfied, he shall appoint as early a time as practicable, not being more than seven days after the

(1) [1916] 1 A. C. 247.

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presentation of the petition, for the consideration thereof; and he may make such further or other inquiries of or concerning the alleged lunatic as he may think fit."

The statement of particulars accompanying the petition may be, and in this case is, very important, referring, for instance, to the lunacy of relatives, but one finds that by s. 317 of the statute the petitioner, the maker of a reception order, or of a medical or other certificate, or of any statement in respect of bodily or mental condition, are all placed in the same boat, and are all made guilty of a misdemeanour, if in any of the abovementioned documents they make a wilful misstatement of any material fact.

It is difficult to see on what principle a petitioner who is guilty of negligence in framing his statement of particulars, but not guilty of misstatement of any material fact, should not be liable to be sued for that negligence as the doctor may be who negligently frames his certificate on examining the alleged lunatic. If the latter comes within the statute of 1893 the former would seem necessarily to be within it also, as he is within s. 317 of the statute.

Sect. 28 of the Act of 1890 is headed: "Requirements of Reception Orders and Medical Certificates."

It enacts that a medical certificate shall be made and signed by a medical practitioner. It is to state the facts upon which the certifying medical practitioner has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others. It provides that a reception order is not to be made upon a certificate on facts communicated by others. By s. 28, sub-s. 4, it is provided that "every medical certificate made under and for the purposes of this Act shall be evidence of the facts therein appearing and of the judgment therein stated to have been formed by the certifying medical practitioners on such facts, as if the matters therein appearing had been verified on oath." This reveals the true nature and function of the medical certificates. They are pieces of evidence just as the statements of the petitioners are pieces of evidence, and are supplied to the judicial authority

to help it to decide on the matter of the petition. Many precautions are taken to make this evidence as reliable as possible. The succeeding sections set out these precautions.

Sect. 29 requires that the person or persons giving the certificate shall have personally examined the alleged lunatic. Where two medical certificates are required each medical practitioner must examine him separately. Sect. 31 provides that one of the medical certificates accompanying a petition shall, where practicable, be under the hand of the usual medical attendant of the alleged lunatic. If that cannot be done the reason is to be stated in writing to the judicial authority to whom the petition has been presented, and is to be deemed part of the petition.

Sect. 32 provides: "No person shall be received or detained as a lunatic in any institution for lunatics, or as a single patient, where any certificate accompanying the reception order has been signed by any of the following persons:—

(*a*) The manager of the institution or the person who is to have charge of the single patient:

(*b*) Any person interested in the payments on account of the patient:

(*c*) Any regular medical attendant in the institution."

It is by s. 33 further provided that "a medical practitioner who is a Commissioner or a visitor shall not sign any certificate for the reception of a patient into a hospital or licensed house, unless he is directed to visit the patient by a judicial authority under this Act, or by the Lord Chancellor, or a Secretary of State, or a committee appointed by the Judge in Lunacy."

Thus everything that could well be done has been done to detach the medical practitioner who signs one of these certificates from the staff of the institution in which the lunatic is to be confined. He cannot have any interest in the payments made on account of any patient confined. In one sense the general public in a community have an interest in the ability, skill, qualification and effectiveness of the medical men residing and practising in that community. The aid of one or more of these can, in any case if need be, be

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obtained by private contract, but in the matter of the reception of an alleged lunatic to an asylum or house licensed, the giver of a certificate owes no duty to the general public or to any public institution or authority whatever. He is not an employee of the State or of any municipal body carrying on certain services for such bodies. He is simply engaged as a medical man by a patient to give an opinion as to that patient's state of health, as he would be to diagnose the state of health of any patient who in his daily practice called upon him to prescribe for him.

I therefore am clearly of opinion that the Public Authorities Protection Act of 1893 does not apply to the appellant's action, and that his remedy is barred by the Act of 21 Jac. 1, and that the appeal should be dismissed.

LORD CARSON. My Lords, I agree with the reasons given and the conclusions arrived at by the noble and learned Viscount on the Woolsack. At the same time I have to admit that it seems to be a strange result that the fact that the appellant proved to the satisfaction of the jury that he never was non compos, should enable the respondent to escape from the damages awarded against him for his negligence, but I can see no answer to the plea of the statute of limitation on which the respondent relies.

LORD BLANESBURGH (read by LORD CARSON). My Lords, the appellant was well entitled to Mr. Neilson's tribute of respect for the moderation and ability with which he presented his case at your Lordships' Bar. By verdicts now of two juries, he, in Lord Buckmaster's words in *Harnett* v. *Bond* (1), "while a sane man has been imprisoned in a private lunatic asylum, and it follows that he has suffered a grievous wrong, for which no money payment can provide an adequate compensation." His moderation and ability displayed in this case only served to disclose as in a flash the extent of that wrong. But great as it has been it can furnish no justification for an order upon the respondent to make the

(1) [1925] A. C. 669, 687.

money payment which the jury here have awarded against him, if in truth the appellant's claim against the respondent is out of time and the objection that it is has been properly taken.

And, my Lords, if the statute of James applies to this case at all, it must, I think, be agreed that the action is out of time. The argument of the appellant upon the construction of that Act, sensible and forcible though it was, left, I thought, almost untouched the reasoning and conclusions both of Horridge J. and the Court of Appeal.

But the appellant's argument raised, in my mind at all events, the gravest doubt whether a limitation statute to which such a construction was alone applicable could really have been left by the Legislature to govern the particular claim made by him in this suit. If it be the function of an appropriate limitation period to hold the scales evenly between plaintiff and defendant, the statute of James seemed to be singularly unsuited to a claim like the present—almost equally so, indeed, whether its true construction was that for which the appellant contended or that put forward by the respondent. On either view the statute must, if applicable, bring, in not a few similar cases, dire results in its train. If, for example, the appellant's contention were to be upheld that in such a case as this the duration of a plaintiff's de facto insanity imputed to him as a result of the defendant's certificate is, like a period of genuine insanity, to be excised from the limitation period it would, indeed, be oppressive, on a medical defendant acting, as the respondent here acted, in perfect good faith, that not within a short period after the disability ceased, but in a suit commenced six years later, he might be called upon to justify his actions, by that time, it may well be, almost, if not entirely, forgotten. If, on the other hand, during the same de facto disability, with consequences to a plaintiff as devastating and paralysing in their incidents and restraints as if he were in fact insane, time, as the respondent contends, was continuously running in favour of the defendant, it would only be necessary that the period of restraint should be sufficiently prolonged, and the wrong

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done to the plaintiff in that respect sufficiently grievous, for him to be deprived by the statute of all remedy, however unjustifiable or even malicious the defendant's acts might have been.

But the improbability that the Legislature had left a claim of this kind to be governed in the matter of limitation by a statute so clumsily inappropriate was shown also by considerations still more pertinent. The provisions of s. 82 of the Lunacy Act itself are even more significant in the same direction. By that section it is provided that the secretary to the Commissioners shall, upon the discharge of a person who considers himself to have been unjustly confined as a lunatic, furnish to him upon his request, free of expense, a copy of the reception order and certificate or certificates upon which he was confined, and, if the order was made upon petition, also of the petition and statement of particulars upon which the reception order was made. That is to say, it is only upon his discharge that the person considering himself to have been unjustly confined is to be supplied with a copy of the certificate upon which his claim to redress in such an action as this depends. Could it have been supposed by the Legislature when enacting that section that the claim of the person so unjustly confined might by that time have become statute barred? I did not think so, and thus was I led to inquire for myself whether some other period of limitation than that prescribed by the general statute of James had not been specially devised by the Legislature for a claim like this, a limitation period which would be consistent with the implications of s. 82 and would be free from the injustice to those in the appellant's position which the statute of James, had it been left applicable, might bring in its train.

And, my Lords, I have, on examination, reached the conclusion that there is such a limitation period in fact specially prescribed by statute, and, relatively unimportant as in the present instance the result would be to the appellant, the principle involved may be of such wide-reaching consequence in other cases that I make no apology for

directing your Lordships' attention to the matter with some particularity.

My Lords, this action was, I think, correctly described by Horridge J., in his considered judgment after the trial, as one by the plaintiff against the defendant, a medical man, for having without reasonable care on November 10, 1912, given a certificate under s. 4, sub-s. 2, of the Lunacy Act, 1890, that the plaintiff was a lunatic and a proper person to be taken charge of and detained under care and treatment. The claim really is one based upon the well known case of *Hall* v. *Semple* (1), for damages due to the breach of the duty which, as there laid down, the defendant owed to the plaintiff under the Lunacy Act not to give a certificate without exercise on his part of reasonable care. The statement of claim here, it is true, does not define the cause of action so precisely. The Lunacy Act, 1890, is not in terms there referred to, and the suit may thus appear to be framed independently of that Act. But the allegations of the claim were not so regarded by the defendant, who, in para. 4 of his defence, alleges that in respect of the matters complained of "he acted in good faith with reasonable care and in pursuance of the statute 53 Vict. c. 5, and that in particular he will rely upon s. 330, sub-s. 1, and s. 331 thereof at the trial."

The issue so raised was accepted. Upon it the whole trial proceeded. The plaintiff did not challenge the defendant's good faith. The defendant did challenge the plaintiff's sanity. The questions put to the jury accordingly were two: (1.) Was the plaintiff of unsound mind on November 10, 1912? (2.) Did the defendant act with reasonable care? To each question the jury answered, "No," and in answer to a third question they assessed the damages at 500*l*.

My Lords, upon these findings two points were made before Horridge J. by the defendant. The first was that *Hall* v. *Semple* (1) was not good law and that the defendant owed no duty under the statute to exercise reasonable care —no duty upon the defendant apart from the statute, I may

(1) (1862) 3 F. & F. 337, 358.

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observe, was ever suggested. The second was that the cause of the plaintiff's detention as a lunatic was the independent order of the justice and not the certificate of the defendant. Both points were decided by the learned judge against the respondent. Neither of them is raised by him now. The point under *Hall* v. *Semple* (1) remains where it was left by this House in *Everett* v. *Griffiths*. (2) There the correctness of that decision was assumed but not decided. Now its correctness is no longer challenged. The jury's verdict accordingly stands and the plaintiff's right to judgment under it is acknowledged, subject only to the question of limitation. That is the one issue before your Lordships, and upon that issue the question that remains is, what statute of limitations applies, and has that statute been pleaded ?

My Lords, in his original defence, the respondent pleaded only one limitation, s. 331 of the Lunacy Act, 1890. The scope of that section is for present purposes important. It can perhaps best be appreciated if reference be had first to s. 330, sub-s. 1, which, as above stated, is also pleaded. That sub-section provides that a person who, after the passing of the Act (inter alia) signs a certificate purporting to be a certificate under the Act "shall not be liable to any civil .... proceedings .... on any ground if such person has acted with good faith and reasonable care." It is (inter alia) with reference to such a certificate and such proceedings that s. 331 provides that "any action brought by any person who has been detained as a lunatic against any person for anything done under this Act shall be commenced within twelve months next after the release of the party bringing the action," a provision, it will be noted, in entire consonance with s. 82, to which reference has already been made.

Here I pause to observe that the corresponding s. 105 of the Lunacy Act, 1845, then in force, was treated by Crompton J., in *Hall* v. *Semple* (1), as the appropriate limitation statute in a case like this. "It is provided," he says, "that no action shall be brought against any person for

(1) 3 F. & F. 337, 358. (2) [1921] 1 A. C. 631.

anything done in pursuance of the Act, unless the same shall be commenced within twelve months" [next after the release of the party bringing the action]; "and if this action had not been commenced within that period I should have thought that part of the section applied."

Sect. 331 of the present Act was accordingly well pleaded. But the section was repealed in 1893; a fact which apparently was overlooked when the defence was delivered. Presumably the repeal was subsequently discovered by the defendant's advisers, and under an order dated December 16, 1925, the defence was amended by adding a paragraph to the effect that the plaintiff's alleged rights of action were barred by the statute of James, the Limitation Act, 1623. In other respects, however, the defence remained unamended; s. 331 of the Lunacy Act, 1890, is still pleaded in para. 4.

Now, my Lords, if I have correctly appreciated and faithfully recorded the true limits and scope of this suit as fought and decided, I cannot myself doubt that if s. 331 of the Lunacy Act had remained unrepealed, that section and it alone prescribed the only period of limitation to which this action was subject. Is, then, that position which goes back at all events to 1845 entirely lost now, although s. 82 of the Act still remains in force? In my judgment, no. The section, although repealed, still speaks, albeit in modified terms. The repeal is effected by the Public Authorities Protection Act, 1893, an enactment whose purpose is to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory or other public duties, and difficult as it has been in many cases to ascertain the true effect of that enactment, no difficulty, I think, arises in this instance. It is only necessary to compare the provisions of s. 331, which is expressly repealed, with the following provision of the Act of 1893 to see that that section still lives in an amended form. The words are these:—

"Where after the commencement of this Act any action . . . . is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended

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execution of any Act of Parliament . . . . or in respect of any alleged neglect or default in the execution of any such Act. . . . .

"(a) The action . . . . shall not lie or be instituted unless it is commenced . . . . in case of a continuance of injury or damage, within six months next after the ceasing thereof."

I cannot doubt, my Lords, that in that amended form s. 331 of the Act of 1890 repealed expressly by the statute still operates, applicable as before to the respondent's certificate but shortening the period after what in the Act of 1890 in the case of a plaintiff who has been detained as a lunatic is termed his "release" to a term which without doubt or possible question makes it a complete bar to the present suit. For, my Lords, while, if s. 331 had been the section applicable, there might have been some question whether the detention for which the respondent was responsible came to an end within twelve months before the institution of the action—I myself, in agreement with my noble and learned friend Lord Atkinson, think it had come to an end long before—there can be no doubt at all that it came to an end more than six months before its institution. The appellant escaped finally from confinement on October 15, 1921, and this action was not commenced until May 31, 1922. In my judgment, therefore, the Public Authorities Protection Act, 1893, is the Statute of Limitations, and the only Statute of Limitations which applies to this action. If pleaded it would have been a complete answer. It, and not the statute of James, is the statute which by way of amendment should have been pleaded in 1925. But it is not pleaded. Accordingly, unless leave is now given to the respondent to amend his defence by rectifying that omission, he has, in my judgment, no answer to this appeal.

But Mr. Neilson applied for leave to amend his defence in that respect should amendment be necessary. I entirely agree that in the circumstances leave to amend should be granted, and on terms which are not onerous. My Lords,

these terms, if they rested with me, would be that as the price of the amendment the respondent should lose his costs of the appeal. I know that the objection was not taken by the appellant himself, but, if my view of the matter be right, the respondent, on his present defence, is in mercy, and the appellant has not had that opportunity of reconsidering his position, which he would have had if the true statute had been timeously put forward. If the appellant had by a proper defence been made to realize that his action was out of time not because, although he had suffered all the penalties of lunacy, he was still to be regarded as sane, but because it was commenced too late after his escape, he might never have persisted in it at all. I cannot myself doubt at all events that the appellant has prosecuted this appeal mainly if not wholly by reason of the intolerable position, as he regarded it, in which the statute of James as interpreted below appeared to place him. To deprive the respondent of the costs of the appeal only would therefore appear to be not ungenerous to him.

My Lords, as will be seen, the appellant gains little by this finding in his favour. But other plaintiffs in his position may gain much. The view I have presented to your Lordships may be wrong. But if it is, a very serious state of things is thereby disclosed. For it results that s. 331, prescribing a period of limitation at least as old as the Act of 1845 and sensible and fair in its operation, has been repealed by a general Act with no corresponding provision substituted, and with the result that plaintiffs in the position of the appellant are now, for the first time as I think, relegated to the statute of James, which is, as I hope I have shown, entirely inappropriate to their case. If this appeal fulfils no other useful purpose, it will at least have served to draw the attention of those engaged in the amendment of the Lunacy Laws to a matter which is not unworthy of their consideration.

VISCOUNT SUMNER. My Lords, I desire to say that my noble and learned friend Lord Wrenbury concurs in the

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judgment which I have already read and in the motion about to be proposed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 27, 1927.

Solicitor for the appellant: *Harry Coulson.*
Solicitors for the respondent: *Le Brasseur & Oakley.*

[HOUSE OF LORDS.]

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N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ . . . . . } APPELLANTS;

AND

JAMES FINLAY AND COMPANY, LIMITED . . . . . } RESPONDENTS.

Service out of the Jurisdiction—Action for Breach of Contract—Contract made out of the Jurisdiction—Performance out of the Jurisdiction—Submission to Arbitration of London Brokers—Award to be enforceable by the High Court of Justice—"Contract to be governed by English law"—Amendment of Points of Claim—Rules of the Supreme Court, Order XI., *r.* 1 (*e*) (*iii.*).

The respondents were Scottish merchants carrying on business at Bombay and the appellants were merchants of Hong Kong. By three contracts made between the respondents and the appellants through the medium of Java brokers the respondents agreed to buy from the appellants certain parcels of Java sugar for shipment to Bombay. The contracts were in similar terms, and each contained the following clause: "Any dispute arising under this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice." As regards the first two contracts, the respondents complained that certain shipments were not made within the stipulated time and claimed damages for breach of contract. The claim was resisted, and the matter was referred to arbitration in the terms of the clause. An award was made, but was set aside by the Court. The appellants then agreed that, if the respondents issued a writ in the King's Bench Division to enforce their claim, they would waive the arbitration clause and submit to the jurisdiction, and this was done. After the pleadings had been delivered the respondents

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* *Present:* VISCOUNT DUNEDIN, LORD PHILLIMORE, and LORD CARSON.

obtained leave from the judge in chambers to amend their points of claim by including a similar claim under the third contract. On appeal to the Court of Appeal it was conceded that the jurisdiction of the judge to allow the amendment depended upon whether he could have made an order for service of the writ out of the jurisdiction under Order XI., r. 1 (*e*) (iii.) :—

Held, that the parties, in submitting their disputes to an English forum, impliedly consented that the law which was to regulate the decision was the law of that forum ; that the contract, the subject of the amendment, was therefore " a contract by implication to be governed by English law " within Order XI., r. 1 (*e*) (iii.), and that the judge could have made an order for service of the writ out of the jurisdiction.

APPEAL from an order of the Court of Appeal (Bankes and Sargant L.JJ.) affirming an order of MacKinnon J. The facts sufficiently appear from the opinion of Viscount Dunedin and from the headnote.

1927. May 17. *Jowitt K.C.* and *Van den Berg* for the appellants. The question is whether the contract which forms the subject-matter of the proposed amendment is a contract " by its terms or by implication to be governed by English law " within Order XI., r. 1 (*e*) (iii.). This particular provision was added to the rule in 1921 to get over the decision of this House in *Johnson* v. *Taylor Brothers & Co.* (1) The arbitration clause, in providing for arbitration by London brokers in the usual manner, is merely saying that the conveniens forum is to be London brokers, who will administer the proper law, and, seeing that this was a contract made out of the jurisdiction, between parties carrying on business out of the jurisdiction, and (apart from providing for a confirmed credit in London) was to be performed out of the jurisdiction, leave to serve the writ out of the jurisdiction could not have been granted. The law which governs the shipment of these goods is Javanese law. To justify an order for service out of the jurisdiction either the whole contract must be performed according to English law or the particular incidents in dispute must be performed according to English law. That condition is not satisfied by referring all disputes to English brokers.

(1) [1920] A. C. 144.

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[They also referred to *Rein* v. *Stein* (1); *Lloyd* v. *Guibert* (2); *Hamlyn & Co.* v. *Talisker Distillery* (3); *In re Missouri Steamship Co.* (4); *Chatenay* v. *Brazilian Submarine Telegraph Co.* (5); Dicey's Conflict of Laws, r. 155.]

Le Quesne K.C. and *D. B. Somervell* for the respondents were not called on.

The House took time for consideration.

1927. May 23. VISCOUNT DUNEDIN. My Lords, the plaintiffs in this case are a firm of Glasgow merchants who have a branch house in Bombay; they deal largely in Eastern produce. The defendants are merchants in Hong Kong. Through the medium of brokers in Java the plaintiffs and defendants entered into three contracts in January and February, 1920, for the purchase by the plaintiffs from the defendants of certain parcels of sugar to be shipped from Java to Bombay c.i.f., the shipments to be made monthly, 100 tons a month in July, August and September, 1920. Provision was made for the opening of a credit in a Hong Kong bank, out of which payments could be made on due presentation of the shipping documents. Each contract contained the following clause: "Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a Rule of the High Court of Justice or any Division thereof." Now, according to the allegations of the plaintiffs, though the earlier shipments were in order the September shipments were not; they were not shipped until October, but the dates of the bills of lading were falsified, so that the plaintiffs were led to believe that the shipments were made in September, and paid the money. On finding out what had been done by the non-arrival in due time of the September shipments they claimed against the defendants for damages. This claim being resisted, parties proceeded to arbitration as in terms of the clause quoted before London brokers, but this was done only in respect of the first two contracts and not in respect of the third. The

(1) [1892] 1 Q. B. 753, 757.
(2) (1865) L. R. 1 Q. B. 115.
(3) [1894] A. C. 202.
(4) (1888) 42 Ch. D. 321, 338.
(5) [1891] 1 Q. B. 79, 82.

brokers gave an award, but the defendants being dissatisfied, raised action before the King's Bench, and succeeded in having the award set aside. The parties then came together, and it was arranged that if the plaintiffs would proceed by ordinary writ, the defendants would accept service and waive the arbitration clause. This was done, and this is the present action. After points of claim and points of defence had been duly lodged, the plaintiffs moved MacKinnon J., before whom the case depended, to add particulars as to the third contract. MacKinnon J. acceded to the request, and granted leave. Appeal was taken to the Court of Appeal, who affirmed what MacKinnon J. had done. It is an appeal from that judgment that is now before your Lordships' House.

Now that it is convenient to try the case of the three contracts together is obvious, but, inasmuch as there has been no agreement on behalf of the defendants as regards the third contract, it is admitted by all that the question whether MacKinnon J. could add the third contract depends on whether, if asked to do so, he could have granted an order to serve outwith the jurisdiction. Seeing that the contract was made outwith the jurisdiction, that the performance of the contract was outwith the jurisdiction, and that the defendants were not subject to the jurisdiction, it is clear that if there was no more to be said, leave would not be granted. But the more that is to be said is the clause already quoted. Now Order XI., r. 1 (*e*) (iii.) provides—omitting unnecessary words—" service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—the action is one brought . . . . to enforce . . . . or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract . . . . by its terms or by implication to be governed by English law." The sole question, therefore, is whether the words of the clause quoted lead by implication to suppose that the contract is to be regulated by English law.

My Lords, I am of opinion that it does. Not only is the tribunal which is to decide all questions as to liability under

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the contract a tribunal of Englishmen in the City of London, who can only be supposed to be conversant with English law, but there is a special stipulation that the award is to be enforceable by an English Court. It is true that the particular way here indicated—namely, making the award a rule of Court—is now antiquated, having been superseded by more modern methods, but the implication remains the same. It seems to me that what the parties here did was to submit their possible disputes to a forum which was an English forum, and that they, therefore, impliedly consented that the law which was to regulate the decision was the law of that forum. That does not mean that everything that would have to be decided would necessarily be decided by English law. It means that the underlying law was the law of England, but if by appropriate, that is to say relevant, averment, it was alleged that any incident of the contract fell to be determined by a foreign law, then the English tribunal would proceed to inquire into that law as a question of fact and give judgment accordingly.

I am therefore of opinion that there is here in the words of the order a clear implication that the matter should be adjudged according to English law. I cannot help remarking that the opposite contention is a curious one for the defendants to take in the light of the fact that as regards the first two contracts, not only did they readily go before the English arbitrators, but when the award was distasteful to them, they availed themselves of the English Courts to set it aside.

My Lords, I move therefore that the appeal be dismissed with costs.

LORD PHILLIMORE. My Lords, I concur. Order XI., r. 1, has, since its first appearance in 1875, been made subject to numerous modifications, and the last extension, which has given rise to the case now under appeal is, we are told, as recent as 1921, and has, so far, only come under discussion in one reported case, which has no bearing upon the case now before the House.

The rule as now altered provides that service out of the jurisdiction shall be allowed in the following case (among others): where the contract is "by its terms or by implication to be governed by English law." What shall be the law which shall govern a contract is (except in some instances, where positive mandatory or prohibitory provisions are dictated as matters of public policy by the State) a matter to be regulated by the intention of the parties, as in fact one of the stipulations of the contract: see *Lloyd* v. *Guibert* (1) and *In re Missouri Steamship Co.* (2)

This contract was made in Java between a company resident there and a Scotch company carrying on business in Bombay, in a language which is either the commercial language or one of the commercial languages of Bombay, for the shipment of goods in Java to be transported by a vessel or vessels of any nationality and delivered at Bombay. So far there is nothing to show that it was intended by the parties that the contract should be governed by English law. So far the lex loci solutionis would seem to be indicated as the governing law. But then there comes the clause which has been quoted by the noble and learned Viscount. Now if this passage had run "to be settled by the High Court of Justice in England," no one could have doubted that the parties had intended that the contract should be governed by that law which English Courts administer, and administer none the less because in certain matters they have to ascertain and apply foreign law. The words of Sir W. Scott in *Dalrymple* v. *Dalrymple* (3) upon this subject are classic. Now the "London brokers" who are to settle this dispute "in the usual manner" will sit in London, and their award will be one to which the Arbitration Act of 1889 will apply. It will be, as Sargant L.J. says, "subject to the control of the High Court in this country." How close that control is can be read in several sections of the Act. The case of *Hamlyn & Co.* v. *Talisker Distillery* (4) is very much in point.

The result is that the forum provided for the settlement

(1) L. R. 1 Q. B. 115.
(2) 42 Ch. D. 321.
(3) (1811) 2 Hag. Con. 54, 59.
(4) [1894] A. C. 202.

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of disputes is English, and that therefore the contract is intended to be governed by English law, and the appeal fails.

LORD CARSON. My Lords, I agree, and I have nothing to add.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 23, 1927.

Solicitors for the appellants: *Ballantyne, Clifford & Co.*
Solicitors for the respondents: *Sanderson, Lee & Co.*

[HOUSE OF LORDS.]

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BOARD OF TRADE . . . . . APPELLANTS;

AND

CAYZER, IRVINE AND COMPANY, LIMITED . . . . . } RESPONDENTS.

Limitation, Statutes of—Arbitration—Charterparty T.99—Arbitration to be Condition Precedent to Commencement of Action—Claim against Crown for Loss of requisitioned Ship—Claimant not proceeding to Arbitration within six Years of Date of Loss—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

In May, 1917, the Crown requisitioned the claimants' steamship under the conditions of the T.99 form of charterparty. By those conditions the Crown undertook liability for war risks only. Clause 31 provided that any dispute under the charter should be referred to arbitration under the provisions of the Arbitration Act, 1889, and it concluded as follows: "and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law." In July, 1917, the steamship was lost, as the claimants alleged, by war risks, but the claimants did not proceed to arbitration until December, 1923. The Crown contended that, as the arbitration was not commenced within six years of the loss, the claim was barred by the Limitation Act, 1623. The arbitrator, by an award made in the form of a special case, found that the steamship was lost by war risks (as to which there was no appeal), and that the claim was not barred by the Limitation Act, 1623:—

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

Held, that under the form of arbitration clause in question no cause of action arose until the award was made, and that consequently time did not run under the Limitation Act, 1623, until the making of the award, and the claim was not barred.

Scott v. *Avery* (1856) 5 H. L. C. 811 applied.

Decision of the Court of Appeal [1927] 1 K. B. 269 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Scrutton L.J., and Romer J.) reversing an order of Rowlatt J.

The following statement of facts is taken from the opinion of the Lord Chancellor :—

"In the month of May, 1917, the Admiralty requisitioned the respondents' steamship *Clan Maclachlan* upon the terms of the well known form of charterparty 'T.99.' Under the terms of that document the Admiralty took the risk of loss by warlike operations ; and the charterparty contained the following arbitration clause : '(Clause 31.) Any dispute arising under this charter shall be referred under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.'

On July 19, 1917, the *Clan Maclachlan*, while on a voyage from Cardiff to Malta with a cargo which included coal for His Majesty's ships and dockyards and other naval stores, came into collision with an Italian steamship off the Straits of Gibraltar, and became a total loss. The respondents forthwith gave notice to the Ministry of Shipping that the loss might fall to be dealt with as a war risk ; but they did not at once take steps to enforce their claim, as certain cases raising questions as to the meaning of the expression 'war-like operations' were then before the Courts. Those cases were finally decided in this House in or before November, 1923 ; and, on November 29, 1923, the respondents appointed Mr. Claughton Scott, their arbitrator under clause 31 of the

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charterparty, to determine the question of the liability of the Crown, and gave notice to the Board of Trade (which had taken the place of the Ministry of Shipping) of that appointment. The Board of Trade made no appointment, and accordingly Mr. Claughton Scott was appointed sole arbitrator.

The arbitrator made his award in the form of a special case raising a number of questions (1); but the only question which survives for your Lordships' determination to-day is whether the arbitrator should have found that the claim of the respondents was barred by the Statute of Limitation (21 Jac. 1, c. 16) by reason of the fact that the first step in the arbitration—namely, the appointment of the arbitrator—was not taken within six years after the date of the loss of the steamship. That question has been answered by the Court of Appeal in the negative, and the Board of Trade now appeals to this House."

1927. May 12, 13, 16. *Sir Thomas Inskip S.-G.* and *Russell Davies* (*Sir Douglas Hogg A.-G.* with them) for the appellants. In an arbitration the arbitrator is bound, in the absence of any provision to the contrary, to determine the dispute in accordance with the general law. Consequently any legal defence (including the defence of the Statute of Limitations) applies to submissions to arbitration in the same way as if the dispute were being determined in an action at law: *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (2); Russell on Arbitrations, 11th ed., p. 394. It is said that *Scott* v. *Avery* (3) shows that under the form of submission in the present case no cause of action arises until the making of the award, and that consequently time does not run until the happening of that event. But until a cause of action is complete there is no possibility for the arbitrator to decide in the claimants' favour. If there were no cause of action at the time of the hearing of the

(1) [The findings are set out in Lord Atkinson's opinion, p. 618, post.]

(2) (1899) 68 L. J. (Q. B.) 252; 80 L. T. 116.

(3) 5 H. L. C. 811.

arbitration the claimants would have no right to recover against the respondents. It is a confusion to use the expression "cause of action" in the same sense in both cases. Here the cause of action arose immediately on the sinking of the ship by reason of the agreement of the Admiralty to undertake liability for war risks. The disability imposed upon a claimant in an action by the Statute of Limitations is not removed by an agreement to submit the matter in dispute to arbitration unless the submission contains an express or implied term to exclude the application of the time limit imposed by the statute, and the submission in this case contains no such term. The question in *Scott* v. *Avery* was not the same. It was whether the jurisdiction of the Court had been ousted or had merely been postponed.

[The following cases were also referred to: *Caledonian Insurance Co.* v. *Gilmour* (1); *Coburn* v. *Colledge* (2); *Read* v. *Brown* (3); *Turner* v. *Midland Ry. Co.* (4)]

Sir John Simon K.C. (with him *A. T. James* and *James Macmillan*) for the respondents. The Statute of Limitations has no application to remedies by or against the Crown.

[At the suggestion of the LORD CHANCELLOR the argument on this point was postponed.]

At common law there is no limitation of the period within which a claim may be enforced: *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (5) Therefore the bar must be found within the actual words of the statute. The Limitation Act, 1623, was a statute which dealt with procedure in certain classes of actions, it was a statute of a very limited scope; and it is therefore wrong to say that the statute applies to arbitrations. An arbitrator may act by analogy of the statute, but only where it is an implied term of the submission that he should do so—where the parties must be taken to agree that he should decide on that basis. Here the Crown has stipulated with the subject that in case of a dispute there is to be no process in any Court unless and until

(1) [1893] A. C. 85.
(2) [1897] 1 Q. B. 702.
(3) (1888) 22 Q. B. D. 128.
(4) [1911] 1 K. B. 832.
(5) (1875) L. R. 7 H. L. 550, 567.

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a particular event has happened. In such a case there is no ground for inferring any analogy. The document itself prescribes the mode of settling the dispute. That which is nothing more than a bar to legal procedure cannot be a bar until the procedure can start. If an action had been brought for damages by the respondents, they would have been met at once by the form of the arbitration clause. Under this clause there is no cause of action until the making of the award. This case is concluded by *Scott* v. *Avery* (1) and *Caledonian Insurance Co.* v. *Gilmour.* (2)

Sir Thomas Inskip S.-G. replied.

The House took time for consideration.

1927. May 31. VISCOUNT CAVE L.C. (after stating the facts :) My Lords, I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (3), that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration ; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred. But this is not the case of an ordinary submission to arbitration, nor is it the case of a dispute arising under the common clause in a contract providing for the submission to arbitration of all disputes arising under the contract. The arbitration clause contained in the charterparty known as T.99 is in a special form, and provides that an arbitration under the clause shall be a condition precedent to the commencement of any action at law. The effect of that condition, as interpreted in *Scott* v. *Avery* (4) and other

(1) 5 H. L. C. 811.
(2) [1893] A. C. 85.
(3) 68 L. J. (Q. B.) 252 ; 80 L. T. 116.
(4) 5 H. L. C. 811, 824, 849, 852.

cases, is that, until the arbitrator has performed his duty and has found whether any and what liability exists, or on the making of his award will exist, the claimant cannot even commence to enforce his claim at law—or (in other words) that until an award is made he has no complete cause of action. Crowder J., in advising the House in the case of *Scott* v. *Avery* (1), said that it appeared to him that under the contract in that case, which contained a similar provision, "no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator." Lord Cranworth, in accepting that view, said that "the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say"; and Lord Campbell was of opinion that, on a just construction of the instrument, "until those questions had been determined by the arbitrators, no right of action could have accrued to the insured."

My Lords, it appears to me that the decision given in *Scott* v. *Avery* (1) disposes of the present appeal. Under the statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited, time runs not from the date of the loss of the steamship but only from the making of the award. If this be so, then the arbitrator, however willing he may have been to give effect to all legal defences, could not properly have found that time had run against the claimants.

It is argued that on this view of the law claimants under a document containing an arbitration clause in the *Scott* v. *Avery* (1) form might delay their proceedings indefinitely, and a claim might be made ten or twenty years after the damage had arisen. This may be so, but, if so, it is a feature which results from the form of contract which the parties have chosen to adopt; and it may be noted that it is at any time open to either party to expedite a decision of the matter by himself instituting proceedings for arbitration.

(1) 5 H. L. C. 811, 824, 849, 852.

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I should add, in order to prevent misapprehension, that the question as to the right of the Crown to take advantage of the statute of limitation, which was referred to in the Court of Appeal, has not been argued in this House and, on the view which I have taken of the matter, does not arise.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT DUNEDIN. My Lords, the Lord Chancellor has narrated the facts and has quoted the clause on which the question turns. I need not, therefore, either recapitulate or requote.

It has, I think, to be kept steadily in view that the liability which is here in question is not a liability in respect of tort. If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the Government, except the liability that sprang from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the Government any liability unless there has been found to be such a liability by the award of an arbitrator. It cannot be more forcibly put than it was by Cranworth L.C. in *Scott* v. *Avery* (1): "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen"; or again by Lord Herschell in *Caledonian Insurance Co.* v. *Gilmour* (2): "Under the policy, the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by . . . . the policy."

The Solicitor-General made a strenuous effort to distinguish the clause in *Scott* v. *Avery* (1) from the present clause. In that I think he was quite unsuccessful. The two clauses

(1) 5 H. L. C. 811, 848, 854. (2) [1893] A. C. 85, 90, 97.

are practically the same. The arbitrator in each is to be the judge, both of the existence of the liability and of the sum to be paid if he finds liability established; and it is that sum and that sum alone that the Government has contracted to pay.

The question here raised is what is the application to these facts of the expression "cause of action" in the statute of James? Now Lord Campbell, in *Scott* v. *Avery* (1), said —and it is the sentence of his judgment which Lord Watson quotes in *Caledonian Insurance Co.* v. *Gilmour* (2), stating that it is the main ground of judgment—that "in this contract it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatever, and no cause of action accrues until the arbitrators have determined."

The Solicitor-General contended that "cause of action" in this sentence was not the same thing as cause of action in the statute of James, but really only meant right of action, which he would differentiate from cause of action. Here, again, I think his contention fails. The expression is, I think, deliberately chosen, and it may not be out of place to remark that the same expression is used by two of the consulted judges whose opinion was upheld—namely, Crowder and Coleridge JJ. (3) Cause of action in the statute of James means that which makes action possible; and in the present case that is the award of the arbitrator, for until it is in being no action is possible.

It was urged that the claimant might indefinitely postpone moving in the arbitration. This is not likely in fact, for people do not generally indefinitely stand out of money which they conceive is due to them. But besides that, there were certainly means available to the defendant to get the arbitration started if the plaintiff unduly delayed.

I am therefore of opinion that the judgment of the Court of Appeal was right.

(1) 5 H. L. C. 811, 848, 854. (2) [1893] A. C. 85, 90, 97.
(3) 5 H. L. C. 823, 824, 843.

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LORD ATKINSON. My Lords, this is an appeal by the Board of Trade acting in the capacity of Shipping Controller by virtue of the statute 11 Geo. 5, c. 8, s. 1, and of an Order in Council of March 24, 1921, No. 447, made thereunder, from an Order of the Court of Appeal dated July 19, 1926, which reversed an order of Rowlatt J., dated December 8, 1925, upon an award dated February 9, 1925, stated in the form of a special case by H. Claughton Scott, Esq., one of His Majesty's counsel.

The question for decision in the appeal is whether, in the circumstances appearing, Messrs. Cayzer, Irvine & Co., Ld., the respondents, at all material dates the owners of a steamship named the *Clan Maclachlan*, and the claimants in the above mentioned arbitration, are entitled to recover from the appellants a sum of money to be ascertained as compensation for the loss of the above mentioned ship.

The facts of the case have already been fully stated. It is unnecessary to restate them beyond what is required to make my judgment intelligible.

It is not disputed that on May 14, 1917, this vessel was requisitioned for the use of the Government on the terms of a pro forma charterparty marked T.99. No formal charterparty was ever signed, but it is not disputed that the vessel entered the Government service on the terms of this pro forma charterparty, and continued to be employed in that service up to the date of her loss. It was provided by clause 18 of this charterparty that the marine risk to which this vessel might, in the Government's service, be exposed, should be for the account of the owners, and that risks of war as therein defined or described should be taken by the Admiralty on the ascertained value of the steamer, if she should be totally lost, at the time of such loss, and that should any dispute as to the value of the steamer arise the same should be settled as laid down in clause 31 of the charter.

Clause 31 runs as follows: "Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to

the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

On July 19, 1917, the steamship *Clan Maclachlan* came into collision with the Italian steamer *Europa* off the Straits of Gibraltar, and was sunk, becoming a total loss. The dividing lines between war risks and marine risks were about this period not accurately defined or described. It was only after several cases decided in the House of Lords from 1920 onwards that those dividing lines and these respective risks were with some accuracy defined. At the time of the loss the *Clan Maclachlan* was insured against marine risks with various underwriters.

The Indemnity Act of 1920 (10 & 11 Geo. 5, c. 48) became law on August 16, 1920, but it did not apply to this case because of the provision that notice of the claim for compensation for loss should, under s. 2, sub-s. 1 (ii.), be given within one year from the termination of the war, or the date when the transaction giving rise to the claim took place—whichever might be the later. In the present case the latter date was the date of the collision, and no notice of claim under this statute was ever given by the owners of this ship to the Ministry of Shipping or other Government Department until August 14, 1923, when the solicitors for the respondent company wrote to the solicitor to the Board of Trade a letter dated August 14, 1923. Even if that letter can be taken as a notice, it is undoubtedly late. This letter, after referring to the litigation in the House of Lords in the *Petersham* and other cases of that kind, winds up with this following paragraph: "The result of the decisions is that marine underwriters are entitled to say that this risk falls on the Government as bearing the war risks under T.99 charter. We shall be much obliged if you will kindly look into the matter accordingly and let us know that liability

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is admitted. Failing an admission of liability, our clients will, of course, proceed with arbitration under the terms of the charter."

The Admiralty did not appoint any arbitrator under the appropriate clause in the Arbitration Act of 1889, and consequently, on December 10, 1923, Mr. Claughton Scott was, under the provisions of the sixth section of the above mentioned Act, empowered to act as sole arbitrator. The proceedings before him included the liability of the Admiralty to the claim made against them, as well as the quantum of the amount of the claim. The arbitrator, at the request of both parties, consented to make his award in the form of a special case for the opinion of the Court on questions of law, and on February 9, 1925, he made and published his award in that form. It contained the following recitals amongst others: "And whereas the said vessel whilst on such requisitioned service was lost in collision in the month of July, 1917. And whereas the claimants allege and the respondents deny that the said vessel was lost by risks of war which were taken by the Admiralty under the terms of the said pro forma charterparty And whereas the said pro forma charterparty T.99 provides that any dispute under the charter shall be referred under the provisions of the Arbitration Act, 1889, to the arbitration of two persons one to be nominated by the owners and the other by the Admiralty And whereas certain disputes and differences have in consequence arisen between the claimants and the respondents as in the following case are more particularly mentioned and described And whereas the claimants allege and the respondents deny that the said arbitration clause in the said pro forma charterparty amounts to a valid submission of the said disputes and differences to arbitration in accordance with the provisions of the said clause."

The following are in it stated to have been the contentions put forward before the arbitrator by the Board of Trade:—

"19. It was contended before me on behalf of the respondents—

"(*a*) That there was no submission to arbitration within

the meaning of the Arbitration Act, 1889, inasmuch as (according to the respondents' contention) there was no written agreement to submit present or future differences to arbitration.

"(*b*) That assuming that there was a valid submission to arbitration, any right which the claimants might have had to proceed by way of arbitration was taken away by the provisions of the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48).

"(*c*) That proceedings in the arbitration were not taken within six years after the date of the loss of the said steamship and that by reason thereof the claimants' claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

"(*d*) That at the time of her loss the *Clan Maclachlan* was not engaged upon any warlike operation.

"(*e*) That both vessels were to blame for the said collision and that in consequence thereof it could not be held that the said collision was a consequence of warlike operations within clause 19 of the said pro forma charterparty.

"(*f*) That the payments made by the marine underwriters and the conduct of the said underwriters and the claimants with regard to the said proceedings against the owners of the steamship *Europa* constituted a good defence to the claimants' claim upon the facts found by me in clauses 1 and 17 hereof inclusive."

And the following are the arbitrator's actual findings:—

"In so far as it is a question of fact I find and in so far as it is a question of law and subject to the opinion of the Court I hold and declare:—

"(19.) (*a*) That there was a valid submission to arbitration within the meaning of the Arbitration Act, 1889; and that I had jurisdiction in the matters referred to me.

"(*b*) That the claimants' right to proceed by way of arbitration under the said submission has not been taken away by the provisions of the Indemnity Act, 1920.

"(*c*) That the claimants' claim was not barred by the Statute of Limitations (21 Jac. 1, c. 16) by reason of the fact that these proceedings were not taken within six years after the date of the loss of the said steamship.

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"(*d*) That at the time of the said loss Malta was a war base and the *Clan Maclachlan* was engaged in a warlike operation within the meaning of clause 19 of the said pro forma charterparty—namely, in carrying war stores to a war base.

"(*e*) That the said collision was a consequence of warlike operations within the meaning of the said clause 19.

"(*f*) That neither the payments made by the Marine Underwriters nor the conduct of the said underwriters or of the claimants with regard to the proceedings against the owners of the steamship *Europa* and the settlement thereof constitute any defence to the claimants' claim.

"(*g*) That the claimants are entitled to an award in their favour in these proceedings against the respondents under clause 19 of the said pro forma charterparty.

"The question for the opinion of the Court is whether in respect of the contentions mentioned in para. 19 hereof I have come to a right determination in point of law.

"If the Court should be of opinion that I have come to a right determination in point of law in respect of each of the said contentions then my award shall stand and I direct that the respondents shall pay to the claimants the costs of this my award and their costs of the reference to be taxed if not agreed.

"If the Court should be of opinion that I have come to a wrong determination in point of law as to the validity of the submission or as to my jurisdiction then I award that the respondents are under no liability in these proceedings and I direct that the claimants shall pay to the respondents the costs of this my award and their costs of the reference to be taxed if not agreed."

The important question at once arises what would be the effect of this art. 31 on any action at law which might be brought by the owner of the *Clan Maclachlan*, based on the pro forma charter T.99, to recover damages from the Board of Admiralty or its successors, in this matter the Board of Trade, for the loss of their ship? In my view, if the case

of *Scott* v. *Avery* (1) was rightly decided—as it has been many times held to have been, and that by the most distinguished judges—such an action would not be maintainable until the condition precedent, i.e., the holding of the arbitration, had been performed, if even then. It is necessary, however, to examine closely the language used by the noble Lords in the House of Lords who delivered judgment in that case, in order to appreciate the meaning and reach of the words they used. The headnote states with sufficient fullness and accuracy what were the points raised and the decision upon them. The action was brought upon a policy of insurance to recover damage for the loss of a ship. One of the conditions of the policy was that the sum to be paid to any insurer for the loss should in the first instance be ascertained by the committee, but if any difference should arise between the insurer and the committee relative to the settling of any loss, or to a claim for average or any other matter relating to the insurance, the difference was to be referred to arbitration in the way pointed out in the condition. Then comes the vital provision—namely, "no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy" until the matter has been decided by the arbitrators, and "then only for such sum as the arbitrators shall award," and the obtaining of the decision of the arbitrators was declared to be a condition precedent to the maintaining of an action. It was held that these conditions were lawful, and that even should the difference relate to other matters than those of mere amount, no action was maintainable till the award was made. From the fifth and sixth pleas filed by the defendants it is obvious that the matter to be referred to arbitration was not merely the quantum of the damages. Lord Cranworth L.C. in giving judgment, said (2): "It appears to me perfectly clear, that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the

(1) 5 H. L. C. 811. (2) 5 H. L. C. 849, 850.

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committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say. . . . . It appears to me perfectly clear, that until the award was made, no right of action accrued." Lord Campbell said (1): "In the first place, I think that the contract between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a deliberate view of the policy, I am of opinion, that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured. That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered; therefore, unless there is some illegality in the contract, the Courts are bound to give it effect. There is no statute against such a contract: then, on what ground is it to be declared illegal?" He then ridicules the notion that it is void as against public policy, and after referring

(1) 5 H. L. C. 851.

to *Thompson* v. *Charnock* (1), he says (2): "There is no case that goes the length of saying, that where the contract is, as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought, although there has been no arbitration. Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined. Therefore, without overturning the case of *Thompson* v. *Charnock* (1), and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocably agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration."

This judgment of Lord Campbell has been many times approved of. In *Caledonian Insurance Co.* v. *Gilmour* (3), the action out of which the appeal in that case arose, was brought by Gilmour, the respondent, against the appellant company to recover on a policy against loss by fire a sum of 1700*l.*, or the amount he might prove to be payable to him by the company as insurers. The policy had a condition indorsed upon it in these words: "Where the company does not claim to avoid its liability under the policy, on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons . . . . who shall choose an umpire. And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company

(1) (1799) 8 T. R. 139. (2) 5 H. L. C. 854.
(3) [1893] A. C. 85.

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and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment, as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy." A point was made by the insured, that as the arbitrators were not named in the clauses referred to arbitration, it was void. This point was held to be irrelevant to the suit. It was held by the House that the condition as to ascertaining the amount of the damage by arbitration was incorporated into, and formed an integral part of, the contract of indemnity, and was a condition precedent to the bringing of an action upon the policy, and secondly that the contract, being one upon which no cause of action accrued until the amount of damage had been determined by arbitration, was excepted from the rules of Scotch law that a reference to arbitrators not named could not be enforced. The case of *Scott* v. *Avery* (1) was followed. Lord Herschell, in delivering judgment, said (2): "I may add that the reasoning of the noble and learned Lords who took part in the decision of *Scott* v. *Avery* (1) appears to me completely applicable to the present case. Its cogency is not affected by any of the distinctions which then existed between the law of England and that of Scotland in relation to arbitration clauses." Lord Watson, in delivering his judgment, referred at length to *Scott* v. *Avery*. He pointed out that it was held by the House, affirming the judgment of the Exchequer Chamber, that until an award was made no action was maintainable, and quoted apparently with approval the passages from Lord Campbell's judgment which I have already quoted.

In the cases of *Trainor* v. *Phœnix Fire Assurance Co.* (3) and *Scott* v. *Mercantile Accident and Guarantee Insurance Co.* (4),

(1) 5 H. L. C. 811.
(2) [1893] A. C. 90.
(3) (1891) 65 L. T. 825.
(4) (1892) 66 L. T. 811.

the decision in *Scott* v. *Avery* (1) was followed and approved of. In *Spurrier* v. *La Cloche* (2) the respondent sued the appellant as agent in Jersey of the Sun Fire Office to recover a sum of 1000*l.* insured by a fire policy dated January 4, 1897, effected by the respondent on his collection of foreign stamps. The appellants pleaded that the policy was made subject to a condition—No. 12—in which it was expressly agreed and declared to be a condition precedent to the liability of the company that the claimant should have no right of action against it except for the amount of the claim, if admitted, or the amount of any award of the arbitrator or arbitrators or umpire, and that the respondents had appointed one arbitrator and the company another, that the arbitrators had not agreed upon an umpire, and that the conditions had not been fulfilled, and he prayed that the action might be dismissed. The respondent pleaded that this condition was contrary to the law of Jersey, and of no force or effect. The committee of the Privy Council which heard the case was composed of Lords Macnaghten, Davey, Robertson and Lindley, and Sir Ford North. Lord Lindley delivered the judgment of the Board. He said: "It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: see *Scott* v. *Avery* (1) and *Caledonian Insurance Co.* v. *Gilmour*. (3) The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Mr. Deans contended that the arbitration clause was invalid by the law of Jersey, because not only the amount payable, but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the court, and went further than *Scott* v. *Avery*. (1) But if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction

(1) 5 H. L. C. 811. (2) [1902] A. C. 446, 450.
(3) [1893] A. C. 85.

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of any Court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular Court to enforce it, that the Court of Exchequer went wrong in *Scott* v. *Avery*. (1) The oversight was pointed out and corrected in the Exchequer Chamber (2), and again in the House of Lords."

I think clause 31 of T.99 brings this case within the authority of *Scott* v. *Avery* (1) and the cases which followed it. I think the condition in its last three lines is as effectual for that purpose as are the more lengthy provisions upon the subject to be found in these authorities. Moreover I am unable to see how a provision to the effect that an arbitration shall be a condition precedent to the commencement of any action does not as effectually secure that no action at law can be brought on the matters referred until this arbitration has been held as any of the lengthy conditions found in the authorities I have cited.

With regard to the Statute of Limitation (21 Jac. 1, c. 16) it has no application, I think, to actions or suits which, by the contracts of the parties to them, are placed in such a position that they cannot be commenced, begun, or enforced. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against any one.

I think the appeal fails, and should be dismissed with costs.

LORD PHILLIMORE. My Lords, when an action in progress is referred to arbitrators for disposal, and no special directions are given limiting or conditioning the functions of the arbitrators, as for instance directing them, as I have known

(1) 5 H. L. C. 811. (2) (1853) 8 Ex. 487.

it happen, to take account of moral or social considerations, the arbitrators must decide the case as a judge would, or as an official referee would, and give effect to all legal defences such as the Statute of Limitations. But when there is no action in progress, and the parties agree to refer their disputes to arbitration, it will depend upon the terms of the agreement to refer, or the submission to arbitration, whichever phrase you use, whether the arbitrators are in deciding to give effect to this class of legal defence or not.

It may be as the judges thought, in the case of *In re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1), that in the absence of special direction it is to be inferred that the parties intended the arbitrators to do precisely what a judge would. It is not necessary, in my view, to decide whether this is so, but for the purpose of the present case I can assume it. I can assume it, because the clause in this charterparty which provides for the submission of disputes arising under it is not, in my judgment, such a submission to arbitration. I cannot better express my view than by adopting the language of Cresswell J. when advising this House in *Scott* v. *Avery* (2) and calling this reference one which makes the arbitration "ancillary to an action or suit." The arbitration is not to take the place of an action at law, but is a necessary step towards an action at law. It is true that an award in such an arbitration may decide all questions in dispute concerning the rights of the parties, so that nothing be left but an action to enforce it, to which action there can be no defence, or that without action an order of the Court may be obtained for enforcing the award. But it is also true that the award of the arbitrators may not completely determine the rights, let alone the remedies, of the parties.

Your Lordships are dealing with a common form of charterparty in use by the Admiralty. It may happen not unfrequently that some clause may be varied by the parties by express agreement, and it may well be that the dispute will take this form. First of all, was the shipowner bound to do so and so without extra remuneration under the terms

(1) 68 L. J. (Q. B.) 252; 80 L. T. 116. (2) 5 H. L. C. 811, 840.

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of the charterparty; and secondly, if he was so bound, was there a subsequent agreement of some particular date which released him from his obligation or varied it? Questions of release or set-off would be outside the jurisdiction of the arbitrators. I doubt whether any adjudication on figures other than such as would be derived from pure calculation would be within the province of the arbitrators.

For the purposes of this case I should introduce another consideration. The authority of the arbitrators extends to deciding upon questions of right and not upon questions of remedy. If there is any question of the latter class, it is to be raised and decided in the subsequent and consequential action at law.

So far as this matter came under consideration in the great case of *Scott* v. *Avery* (1), the language of the learned and noble Lords who decided that case is to this effect. The Lord Chancellor speaks "of no right of action accruing," until after the award. Lord Campbell says "no cause of action accrues until the arbitrators have determined." The same point is very clearly expounded in *Caledonian Insurance Co.* v. *Gilmour.* (2) See especially per Lord Field. But if this be so there is no action or suit to which the Statute of Limitations can apply until the arbitrator has found in favour of the claimant.

These are sufficient grounds for holding that the appeal by the Board of Trade fails, but the matter may—as it was put in the course of the argument—be put in another way equally fatal to the appeal.

Assuming that the arbitrator is to consider remedy as well as right and to give effect to legal defences, and that he does, as indeed the arbitrator did in this case, take into account the Statute of Limitations, he would ask himself did a cause of action accrue to the claimants more than six years ago? and he would have to answer in the language of *Scott* v. *Avery* (1), "No." A claim which might have ripened into a cause of action did accrue; but it cannot ripen till after his decision.

(1) 5 H. L. C. 811. (2) [1893] A. C. 85, 102.

One word more. It is said that this construction of the clause in the charterparty would enable a shipowner to bring, after many years' delay, the stalest of claims. To this there are other answers, but one is sufficient. It would be easy to amend the form of charterparty and introduce a clause such as one finds in a number of similar commercial instruments, making it incumbent upon a claimant to make his claim in writing within some brief defined period after the occurrence of the event which gives rise to the claim.

I agree that this appeal should be dismissed.

LORD CARSON. My Lords, I agree, and I am unable to add anything to what has been already said by the noble Viscount on the Woolsack.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 31, 1927.

Solicitor for the appellants: *Solicitor, Board of Trade.*
Solicitors for the respondents: *Ince, Colt, Ince & Roscoe.*

[HOUSE OF LORDS.]

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McDOWELL . . . . . APPELLANT;

AND

STANDARD OIL COMPANY (NEW JERSEY) AND ANOTHER . . . . RESPONDENTS.

Trade Mark—Registration—Calculated to Deceive—Discretion of Registrar—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19—*Trade Marks Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *s.* 8, *sub-s.* 2.

An application by the appellant, a Liverpool oil merchant, to register the word "Nuvol" as a trade mark in respect of illuminating, heating and lubricating oils was opposed by the respondents, the Standard Oil Company of New Jersey, who were the registered owners of the word "Nujol" in respect of medicinal preparations for human use and had for several years past been selling by their agents in this country a preparation of highly refined paraffin under that name, and was refused by the registrar on the ground that the use of the word "Nuvol" was calculated to deceive:—

Held, that the appellant had not proved to the satisfaction of the House that confusion might not arise from the registration of his mark.

Eno v. *Dunn* (1890) 15 App. Cas. 252 applied.

Per Viscount Dunedin. Sect. 8, sub-s. 2, of the Trade Marks Act, 1919, does not affect the observations made by him, giving the judgment of the House, in *George Banham & Co.* v. *F. Reddaway & Co.* ante p. 406 as to the importance to be attached to the decision of the registrar.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Astbury J. and restoring a decision of the registrar whereby he refused an application by the appellant for registration of a trade mark consisting of the word "Nuvol," No. 443,189 in class 47, in respect of illuminating, heating and lubricating oils.

The appellant applied for registration of the said trade mark on November 30, 1923. For about three years before the date of the application he had been carrying on business as an oil merchant in Liverpool, but had not theretofore used any trade mark in connection with his business. The

* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD CARSON.

respondents, a corporation organized under the laws of New Jersey, U.S.A., were the proprietors of a trade mark consisting of the word "Nujol" registered in 1915 in class 3, under No. 368,084, in respect of medicinal and curative preparations for human use and had ever since sold under that name a highly purified paraffin oil as a remedy for human ailments, and this preparation had acquired a great reputation; and they opposed the appellant's application on the ground that the word "Nuvol" in respect of the goods for which it was claimed was calculated to deceive and to lead to the belief that such goods were marketed by the respondents or were of the respondents' manufacture or merchandise.

The respondents alleged that the appellant had chosen the word "Nuvol" from fraudulent and dishonest motives, but this charge was disproved at the hearing before Astbury J. and was no longer persisted in.

The respondents' Nujol was sold in small bottles or tins in chemists' shops as a medicine. It was in fact a highly refined paraffin sold at a price largely in excess of the price at which any illuminating, heating or lubricating oils would be sold, and it was colourless, odourless and tasteless. Up to the end of 1921 it was described as "Paraffinum Liquidum B.P.," but since that time the respondents had ceased to describe it as paraffin or to indicate that it was an oil of any kind. There was evidence that it was capable of being used as a lubricant for fine machinery and that it had occasionally been so used.

The respondents had also for many years carried on a very extensive business as producers, refiners and vendors of oils for heating, illuminating and lubricating purposes. Up to 1912 such oils were sold in this country under their own name, but since that time these oils had been sold here by the Anglo-American Oil Company in the name of that company.

The appellant's oil was sold in large drums direct to the users, principally engineers, manufacturers and colliery proprietors and, if sold in the market, it would ordinarily

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be sold by oil merchants, and not by chemists. It was quite unsuitable for any medicinal or curative purpose and was unfit for human consumption. From March, 1924, to April, 1925, the appellant, in the course of his trade, obtained some 300 barrels of oil from the Anglo-American Oil Company. At his request that company rebranded the barrels of oil sold to him with his name and the mark "Nuvol," and no objection was taken by the company to this course.

The Registrar of Trade Marks, in view of the wide reputation of the respondents in the lubricating oil trade, together with the registration and use by them of the mark "Nujol" in respect of medicinal and curative oils, was of opinion that the registration of the mark "Nuvol" for lubricating oils would create confusion and deception as to the origin of the goods and that the appellant had failed to discharge the onus which was upon him of showing that registration and use of the mark would not be calculated to deceive, and he therefore refused registration.

Astbury J., having regard to the different character of the goods in question and the purposes for which they were sold, was of opinion that the appellant had discharged the onus which was upon him and directed the registrar to proceed with the registration.

The Court of Appeal (Lord Hanworth M.R., Warrington and Sargant L.JJ.) held either that the appellant's mark was calculated to deceive, or that the appellant had failed to show that it was not, and they restored the decision of the registrar.

1927. May 26, 27. *Macmillan K.C.* and *Trevor Watson* for the appellant. The question is whether the appellant's trade mark is disentitled to protection by reason of its being calculated to deceive. The expression "calculated to deceive" in the Trade Marks Acts may mean either intended to deceive or likely to deceive; but it does not include the capability of the mark being used for deceptive purposes: *In re Kutnow's Trade Mark.* (1) The appellant admits that

(1) (1893) 10 R. P. C. 401, 406.

he has to prove affirmatively that the mark is not calculated to deceive : *Eno* v. *Dunn* (1), but in his submission upon the facts of this case he has discharged that onus. This matter is dealt with in ss 11 and 19 of the Trade Marks Act, 1905, but the question here really depends upon s. 19, which lays down two tests : 1. Are the goods or description of goods in respect of which the appellant proposes to register his trade mark the same as the goods or description of goods in respect of which the respondents have registered their trade mark ? 2. If so, does the trade mark of the appellant so nearly resemble the trade mark of the respondents as to be calculated to deceive ? "Nuvol" was invented by the appellant in complete innocence and with no intention to deceive any one, therefore the only question is whether it is likely to deceive. The appellants are proposing to register the word "Nuvol" in class 47 in respect of illuminating, heating and lubricating oils. The respondents' mark "Nujol" is registered in class 3 for medicinal and curative preparations for human use. The respondents do not sell illuminating, heating and lubricating oils in this country except through the Anglo-American Oil Company. They do not sell under their own name, and they have no place of business in this country. Nujol is a chemist's preparation and is sold as a medicine ; the fact that it is a refined petroleum is carefully concealed from the public; it is not sold as an oil at all ; nor is it in fact a lubricating oil in the commercial sense ; it is sold in small bottles and tins by chemists and druggists ; and it is quite outside the business of an oil merchant. Nuvol is sold in large barrels and drums and, when sold in the market, is sold by oil merchants, who do not deal in medicaments at all. The word "Nuvol" was affixed for over a year at the appellant's request to barrels of oil supplied to him by the Anglo-American Oil Company without comment. In these circumstances there is no risk that Nuvol may be bought under the mistaken idea that it is Nujol or that it is a product of the respondents. The actual use of the appellant's mark does not prejudice the respondents, and the possibility

(1) 15 App. Cas. 252, 257.

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that the mark might conceivably cause confusion if it were misapplied may be disregarded. It is true that the appellant has not an absolute right to registration in cases where the mark is not calculated to deceive, but under s. 12, sub-s. 2, of the Act of 1905 the registrar has a discretion in the matter: *Eno* v. *Dunn* (1); *George Banham & Co.* v. *F. Reddaway & Co.* (2) But s. 8, sub-s. 2, of the Act of 1919 confers upon the Court in any appeal from the decision of the registrar the same discretionary powers as are conferred on the registrar. Therefore each court of appeal exercises afresh an original discretion; the appellant has not got to show that there has been a mistake in law or miscarriage of justice, as in an ordinary appeal against an exercise of discretion. This enactment was not brought to the notice of the House in *Banham's* case and was not referred to by Viscount Dunedin in his observations in that case upon the importance to be attached to the decision of the registrar.

Sir Duncan Kerly K.C. and *F. E. Bray* for the respondents were not called on.

VISCOUNT CAVE L.C. My Lords, in the year 1923 the appellant, who is a Liverpool oil merchant, was desirous of registering the invented word "Nuvol" as a trade mark in respect of illuminating, heating and lubricating oils. He had not at that time used the trade mark in connection with his goods to any substantial extent. He issued the usual preliminary advertisement, and thereupon the respondents, the Standard Oil Company of New Jersey, informed him that they had registered the invented word "Nujol" in respect of medicinal and curative preparations for human use, and were selling here, through their agents, a preparation of refined paraffin under that name; and they suggested that, as the registration of the word "Nuvol" was calculated to lead to confusion between the goods sold under that name and those sold under the trade mark "Nujol," the appellant should withdraw his application. The appellant did not

(1) 15 App. Cas. 252, 261. (2) Ante, pp. 406, 412–13.

give way and, accordingly, the respondents opposed the registration, which was refused by the registrar on the ground that the use of the word "Nuvol" was calculated to deceive and, to use his language, that the two words were too much alike to be allowed independent registration by different proprietors. On appeal to the High Court that decision was reversed by Astbury J., who directed that the registration should proceed; but his decision was in turn reversed by the Court of Appeal, and the decision of the registrar was restored. Hence this present appeal. I should add that, at one time, a charge was made against the present appellant that he had purposely adopted the proposed trade mark "Nuvol" with the dishonest intention of appropriating some part of the goodwill which belonged to the respondents in respect of their trade mark "Nujol," but, in the evidence led before Astbury J., that suggestion was entirely displaced; the learned judge found that there was no foundation at all for it, and that charge has since been withdrawn, or not insisted upon, by the other side. Therefore, the only question is whether, in your Lordships' judgment, the adoption of the trade mark "Nuvol" would be calculated to deceive or mislead the trade or the public and to produce confusion between the goods of these two traders.

My Lords, it has been long ago decided, and is quite clear, that the words "calculated to deceive" which are found in s. 11 of the Trade Marks Act, 1905, do not mean "intended to deceive" but "likely (or reasonably likely) to deceive or mislead the trade or the public." It has also been held in the case of *Eno* v. *Dunn* (1), decided in your Lordships' House, that the burden of proving that a proposed trade mark is not likely to deceive lies upon the applicant, and also—a proposition which, I think, follows upon the last—that if that proof is incomplete and the matter is, as Lord Watson said in that case, in dubio, the application may be refused. I would add that registration under the Acts is a matter of discretion; and, although the decision of the registrar in the matter is by no means conclusive and under

(1) 15 App. Cas. 252.

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s. 8, sub-s. 2, of the Trade Marks Act, 1919, the question is entirely open for the Courts, yet the fact that the registrar, an experienced official, has decided against an application on the ground that registration might lead to confusion, must still carry considerable weight with any Court or tribunal which has to review his decision.

My Lords, here we start with the fact that the two words "Nuvol" and "Nujol" are both invented and, to most people, meaningless words, and are almost identical both in spelling and in sound, for there is a difference only of one letter in the middle of the word, and unless pronunciation is very distinct it is not difficult to mistake one word when spoken for the other. The appellant, therefore, who has to displace the inference to be drawn from that fact, starts with a somewhat heavy burden.

Now the appellant has proved certain facts which are material. He says that the goods are different in the sense that his own goods are oils to be used for lighting or heating or lubricating, while the goods of the respondents consist of a preparation to be used for medicinal purposes. He says, as I have indicated, that they are used for different purposes and that makes a distinction. No doubt that observation is quite true and has force. He also says—and this, with me, carries less weight—that the respondents have not been in the habit of selling their preparation of oil under their own name. I do not think that matters much, because the preparation of oil has been sold as "Nujol" by the agents who have sold it, and the real question is whether the registration of the appellant's proposed mark would interfere with the sale of "Nujol." As Sargant L.J. put it: "The public will be equally deceived for all practical purposes, if they merely identify or confuse the producers of 'Nuvol' with the producers of 'Nujol,' whether they know the actual name of the producers of 'Nujol' or not." Again it is said that the Anglo-American Oil Company, who are the sellers of "Nujol," consented to brand the term "Nuvol" on the appellant's casks or drums. That, no doubt, is a fact, but I do not attach much weight to it, because we do not know

why that was done and upon which side the greater interest of the Anglo-American Oil Company lay.

Those are all facts which your Lordships will consider, but, on the other hand, there are these considerations. First, there is the similarity, amounting almost to identity, of the name, so that the matter stands almost as if the appellant proposed to write "Nujol" on his goods. Secondly, in each case the goods in question are oils and consist of petroleum, the only difference being in the degree of refinement. The appellant's oils would, at present at all events, be sold in a somewhat raw state, while the respondents' goods are, presumably, to a great extent refined; but the appellant, and purchasers from him, would be free to refine the oil up to any degree which they might think desirable, and here again I would refer to the judgment of Sargant L.J., who says this: "But on the other hand, if the applicant once succeeded in obtaining the registration of 'Nuvol' as his mark, it could be used in respect of lubricating oil of any grade of refinement and sold in any quantity and at any price. And there might, and I think probably would, be a far smaller difference between the opponents' medicinal oil 'Nujol' and the finest grade of lubricating oil ultimately sold under the name 'Nuvol' than between the finest 'Nuvol' and the coarsest grade of 'Nuvol' sold for lubricating heavy machinery." In other words, the difference is one of degree only—namely, the degree of refinement to which the paraffin may be subjected. Lastly, there is the fact that the registrar, with all his experience, thought that the two words were too much alike to be allowed independent registration, and for myself I attach considerable weight to the opinion he expressed. Upon the whole I am not satisfied that if this mark were registered there would be no risk of confusion, and I think it is unfortunate that the appellant, having had his attention called to the respondents' trade mark, did not then withdraw his application but preferred to take the risk of a successful opposition.

I think that this appeal fails, and I move your Lordships that it be dismissed with costs.

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VISCOUNT DUNEDIN. My Lords, I concur. I do not conceal that to me it is a very narrow case, and I think it is just when it is a very narrow case that real weight ought to be given to the original determination of the registrar. It is quite true that in the recent case of *George Banham & Co.* v. *F. Reddaway & Co.* (1) the Act of 1919 was not mentioned, but I have looked carefully at s. 8, sub-s. 2, and I do not think that that section really makes any difference to the remarks which I, giving the judgment of the House, made in that case.

For these reasons, I concur in the motion proposed. After all, it is not only the question of the registrar but, in order to grant this appeal, we should have to be of opinion that the Court of Appeal also was wrong.

LORD ATKINSON. My Lords, I concur.

LORD WRENBURY. My Lords, I concur.

LORD CARSON. My Lords, I also concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 27, 1927.

Solicitors for the appellant: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for the respondents: *Halse, Trustram & Co.*

(1) Ante, p. 406.

plied. CHAPELLE v. CHAPELLE. 1 All E.R. 236.
Applied. CHAPELLE v. CHAPELLE [1950] P. 134

[HOUSE OF LORDS.]

SALVESEN OR VON LORANG . . . APPELLANT; AND ADMINISTRATOR OF AUSTRIAN PROPERTY . . . . . RESPONDENT.

H. L. (Sc.)* 1927 May 27.

International Law—Husband and Wife—Nullity of Marriage—Foreign Decree—Celebration of Marriage in France between an Austrian and a Scotswoman—Want of Formalities—Domicil of Parties in Germany—Annulment by German Court—Judgment in rem—Recognition by Scottish Court.

(1) Where the validity of a marriage is in dispute the Court of the domicil of the parties has jurisdiction, whether it is an exclusive jurisdiction or not, to pronounce a decree of nullity of marriage.

(2) A decree of nullity of marriage pronounced by a Court of competent jurisdiction, whatever be the ground of the decree, is a judgment determining status and is equivalent to a judgment in rem.

(3) Where therefore the parties are domiciled in a foreign country a decree of nullity of marriage pronounced by a competent Court of that country will, in the absence of fraud or collusion, be recognized as binding and conclusive by the Courts of England and Scotland, unless it offends against British notions of substantial justice.

Niboyet v. *Niboyet* (1878) 4 P. D. 1 overruled.

Dictum of Brett L.J. in his dissentient judgment in *Niboyet* v. *Niboyet* 4 P. D. 1 disapproved.

Dictum of Lindley M.R. in *Pemberton* v. *Hughes* [1899] 1 Ch. 781, 790 followed.

Sinclair v. *Sinclair* (1798) 1 Hag. Con. 294; *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; and *Ogden* v. *Ogden* [1908] P. 46 considered.

Decision of the First Division of the Court of Session 1926 S. C. 598 reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary in an action of multiple poinding.

In June, 1897, the appellant, formerly Miss Salvesen, a British subject domiciled in Scotland, went through a form of marriage in Paris with Herr von Lorang, an Austrian subject. The parties thereafter settled in Wiesbaden, in Germany, where they lived together as man and wife, except during the period of the war, when Herr von Lorang served

* *Present:* VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD PHILLIMORE, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

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with the Austrian army and the appellant lived in Switzerland, until 1923. In that year the respondent claimed the movable property of the appellant in Scotland, which was then in the hands of her agents and bankers, under the Treaty of Peace (Austrian) Order, 1920, and an amending Order of 1921, on the ground that she became an Austrian national by her marriage. The holders of the movable property brought an action of multiplepoinding to have it determined who was entitled to the property and to obtain their discharge. The property was claimed by the respondent and by the appellant, who averred that she had recently discovered that her marriage in Paris was null and void because certain formalities required by the law of France had not been observed, and intimated that she intended to bring a suit of nullity of marriage in the civil Court of Wiesbaden, the Court of the domicil of Herr von Lorang and herself, and the action of multiple poinding was sisted for this purpose. The nullity suit was brought (the respondent not intervening), and the Court of Wiesbaden declared the marriage null and void. Thereupon the respondent raised several objections to the validity of the decree of the German Court, and in particular averred that the decree was obtained by collusion, and that it proceeded upon a mistaken view of the law of France; but the jurisdiction of the German Court was admitted. The question for determination was whether the decree of the German Court should be held binding on the Scottish Courts for the purpose of excluding the respondent's averments from inquiry.

The Lord Ordinary (Lord Morison) repelled the respondent's claim for a proof, and preferred the appellant to the property.

The First Division, by a majority (the Lord President, Lord Blackburn and Lord Ashmore; Lord Sands dissenting), recalled the interlocutor of the Lord Ordinary and remitted the case to him to allow the parties a proof of their respective averments.

1927. March 28, 29, 31. *Macmillan K.C.* and *Normand K.C.* (with them *W. D. Patrick*) (all of the Scottish Bar) for

the appellant. The appellant's case is not that this matter is res judicata, because the nullity action was not between the same parties, but that the decree of nullity was a judgment on status and was in the nature of a judgment in rem, and as such ought to be accepted by the Courts of this country. It is admitted that the Court at Wiesbaden was a Court of competent jurisdiction to pronounce upon this matter, and, in the appellant's submission, it was the only competent Court. It is further admitted that if the judgment were a decree of divorce it would be binding on the Scottish Courts. Lastly, it is admitted that if the judgment were one declaring the parties to be duly married it would be binding and conclusive. It is, however, objected that a judgment annulling the marriage is not conclusive, because it is not a judgment determining status. But the question before the Court at Wiesbaden was whether the appellant was a married woman or not, and that is a question of status. Therefore the decree of the Court is a judgment determining status and partakes of the quality of a judgment in rem and is universally binding. The respondent's argument must go to this length, that it is impossible to obtain from any Court a universally binding decree of nullity. The argument appears to be that decrees of nullity are in a category by themselves—that whereas a decree of divorce assumes the marriage status and then does something with it, a decree of nullity says that there never has been a marriage and is therefore not a decree disposing of married status. The Lord President, however, does not appear to go so far. In his view a decree of nullity on the ground of the failure to comply with the formalities required by the lex loci celebrationis is not a judgment on status but is of local application only, but he hesitates to apply his reasoning to all judgments of nullity. The question what is the legal nature of a judgment of nullity has never been considered in this House. The authorities show a great difference of view on this point, some assimilating a judgment of nullity to a judgment of divorce and others differentiating it from a judgment of divorce. In the appellant's submission the reasoning in favour of universality in cases of divorce is

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just as applicable to a judgment of nullity. Lord Penzance in *Wilson* v. *Wilson* (1) states the general principle as follows: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another." It is, however, not strictly accurate to say that every judgment of divorce is unchallengeable. The Court may have no jurisdiction to pronounce the judgment, and in that case there is really no divorce, or the judgment may be contrary to natural justice, as where judgment is given against a person not cited. But the general rule is that a decree of divorce pronounced by the Court of the domicil is universally binding. In *Cottington's Case* (2), reported in a note to *Kennedy* v. *Earl of Cassillis* (3), Lord Nottingham had previously stated the same principle, and in that case a decree of divorce pronounced by a competent foreign tribunal, namely, the Archbishop of Turin, was recognized by the English Courts. See also *Roach* v. *Garvan* (4), per Lord Hardwicke. In *Sinclair* v. *Sinclair* (5) the parties intermarried in France and subsequently in England. The husband brought an action against the wife in Brussels in respect of the French marriage for nullity and divorce by reason of adultery and obtained from the Court in Brussels a decree of nullity after proof of adultery. The wife subsequently brought a suit for divorce against her husband in

(1) (1872) L. R. 2 P. & M. 435, 442.
(2) (1678) 2 Swans. 326n.
(3) (1818) 2 Swans. 313.
(4) (1748) 1 Ves. Sen. 157, 158.
(5) 1 Hag. Con. 294.

England and asked for dissolution of the English marriage. Defence that the marriage was already annulled. Sir William Scott, in holding that the proceedings in Brussels were not a bar to the suit, discussed the question of the respect to be paid to foreign judgments, and he undoubtedly did draw a distinction between nullity and divorce. The Brussels judgment was not binding on any hypothesis, but some dicta of the learned judge are strongly relied on by the respondent. The case has been much discussed because it is so imperfectly reported. Those dicta may be treated as a signpost of warning that judgments of nullity are not necessarily on the same footing as judgments of divorce qua universality: see Westlake's Private International Law, 6th ed., § 340. In *Simonin* v. *Mallac* (1) the question was raised as to the law of capacity applicable to the marriage in England of a domiciled Frenchman and Frenchwoman. The marriage had been annulled in France on the ground of the man's want of capacity to contract marriage according to the law of that country, but in a suit brought by the woman in England for nullity the English Court held that the question of capacity depended not upon the law of the domicil but upon the law of the locus contractus. This is not and never has been the law of Scotland. The mere fact of celebration in Scotland would not give the Court jurisdiction: Fraser on Husband and Wife, 2nd ed., vol. ii., p. 1275. In *Hobbs* v. *Henning* (2) Erle C.J. said: "The rule making the decision of a Court, which creates the status of a person or thing, conclusive upon all persons as to the existence of that status, has been regarded as salutary," and, as an example of that rule, he gives "sentences of nullity of marriage in the Ecclesiastical Courts." In *Longworth* v. *Yelverton* (3) Lord Chelmsford L.C. expressed the opinion that a decree of declarator of marriage was a judgment in rem and was therefore binding on all persons whomsoever. *Niboyet* v. *Niboyet* (4), where the Court of Appeal decided, by a majority,

(1) 2 Sw. & Tr. 67.
(2) (1865) 34 L. J. (C. P.) 117, 123.
(3) (1867) L. R. 1 H. L. Sc. 218, 224; 5 M. (H. L.) 144, 147.
(4) 4 P. D. 1, 9, 13.

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that an English Court had jurisdiction to dissolve a marriage between persons not domiciled in England, cannot now be treated as law; but James L.J. there said that a decree of nullity of a pretended marriage was quite as much a decree in rem as a decree of divorce. Brett L.J., in his dissentient judgment, said that a decree determining what was the status of an individual was a judgment in rem, and that a judgment in rem of the Courts of a country in which the parties were domiciled was treated as binding on all parties. If the Courts of any country should assume, by a decree of divorce or any other decree determining the status of a married person, to alter the status of a foreigner not domiciled, a man or woman would be treated as married in one country and not in another. In his opinion the law of the domicil was the true law to be applied to any alteration of the relation between the parties which arose from their marriage. He, however, did not think that this law applied to a declaration of nullity of marriage. The basis of the distinction between decrees for divorce and nullity is that in divorce jurisdiction is founded on domicil and domicil is founded on marriage, but where the marriage itself is in question it cannot be founded on as determining domicil or conferring jurisdiction. But, as was pointed out by Sir James Hannen in *Turner* v. *Thompson* (1), a woman may acquire a domicil by residence in a country with a man who is not really her husband—an independent personal domicil, not a derivative domicil. In *Ogden* v. *Ogden* (2) this distinction was relied on by the Court of Appeal, but it does not apply to the present case, because the appellant had in fact as well as in law acquired a domicil in Germany. That decision was mainly based upon *Simonin* v. *Mallac* (3), which, as already stated, is not in accordance with the law of Scotland. If necessary, it is submitted that *Simonin* v. *Mallac* (3) and *Ogden* v. *Ogden* (2) were wrongly decided, but they are also distinguishable, because in both those cases the marriage was celebrated in England. *Stathatos* v. *Stathatos* (4) and

(1) (1888) 13 P. D. 37, 41, 78.
(2) [1908] P. 46.
(3) 2 Sw. & Tr. 67.
(4) [1913] P. 46.

De Montaigu v. *De Montaigu* (1), which were both cases of undefended petitions, proceeded upon *Ogden* v. *Ogden* (2) and carry the matter no further. In *Mitford* v. *Mitford* (3) a German decree of nullity of marriage was recognized as binding by the English Court. The married or unmarried position of persons being a question of status, the German decree of nullity is a judgment on status, and a judgment on status is a judgment in rem and is universally binding: see Smith's Leading Cases, 12th ed., vol. ii., Notes to the *Duchess of Kingston's Case*, p. 776. Where the jurisdiction of the Court is admitted, as it is here, the binding character of the judgment is equally effective whether it is a decree of nullity or divorce. "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice": *Pemberton* v. *Hughes* (4), per Lindley M.R. Collusion is alleged, but there was here no collusion in the only relevant sense of collusion as a fraud upon the Court: *Walker* v. *Walker*. (5) See also *Bater* v. *Bater*. (6) The authorities show a progressive recognition of the universal effect of foreign decrees of divorce pronounced by the Court of the country where the parties are domiciled as being judgments determining status and therefore judgments in rem, and for this purpose there is no difference between a decree of divorce and a decree of nullity of marriage. The insular position formerly adopted in England that only an English Court can dissolve or annul a marriage celebrated in this country has now been abandoned.

[They also referred to *Warrender* v. *Warrender* (7); *Attorney-General for Alberta* v. *Cook* (8); *Murison* v.

(1) [1913] P. 154.
(2) [1908] P. 46.
(3) [1923] P. 130, 141, 142.
(4) [1899] 1 Ch. 781, 790.
(5) 1911 S. C. 163, 169.
(6) [1906] P. 209.
(7) (1835) 2 Sh. & Macl. 154; 2 Cl. & F. 488.
(8) [1926] A. C. 444, 454.

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Murison (1); *G.* v. *M.* (2); *A.* v. *B.* (3); *Godard* v. *Gray* (4); *Castrique* v. *Imrie.* (5)]

Hon. Wm. Watson L.A. (with him *MacRobert S.-G.* for Scotland and *Albert Russell* (of the Scottish Bar)) for the respondent. A foreign judgment in rem is in effect the disposal by a foreign Court of a res which is rightfully subject to its control and is by the comity of nations generally regarded as being universally conclusive in relation to the disposal of the res. A decree determining status is not strictly speaking a judgment in rem. But a foreign decree of divorce has been treated as standing on the same footing as a judgment in rem, the res being the married status of the spouses, which the husband's domicil places in the control of the foreign Court, and the decree of divorce operating as the disposal of the res by the Court. But there is no authority for the view that a decree of nullity of marriage should be regarded as a judgment in rem, and there is a marked distinction between a decree of nullity and a decree of divorce. A decree of nullity does not dispose of married status as a res, but affirms judicially that the contract of marriage and the married status never had legally any existence whatever. Moreover if this decree of nullity is to be treated as a decree in rem, it is only binding in respect of the same res. The res in the present action is the property and the German Court has no jurisdiction over the property; the question in Scotland is who has the right to this property; the marriage is merely an incidental fact. As to the authorities: In *Sinclair* v. *Sinclair* (6) Lord Stowell said with regard to the respect due to foreign judgments that a foreign sentence of separation, in a proper Court, for adultery would be entitled to credit in the English Courts, but he thought the conclusion was carried too far when it was said that a sentence of nullity of marriage was necessarily and universally binding on other countries. Adultery and its proofs were nearly the same in all countries. The validity

(1) 1923 S. C. 624.
(2) (1885) 10 App. Cas. 171.
(3) (1868) L. R. 1 P. & M. 559, 561.
(4) (1870) L. R. 6 Q. B. 139, 151.
(5) (1870) L. R. 4 H. L. 414, 447, 448.
(6) 1 Hag. Con. 294, 297.

of marriage, however, must depend in a great degree on the local regulations of the country where it was celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but he was not prepared to say that a judgment of a third country on the validity of a marriage not within its territories nor had between subjects of that country would be universally binding. That exactly covers this case. *Simonin* v. *Mallac* (1) and *Ogden* v. *Ogden* (2) proceeded upon that principle, and in the latter case Lord Stowell's dictum was expressly followed. *Ogden* v. *Ogden* (2) has been acted upon in *Stathatos* v. *Stathatos* (3) and *De Montaigu* v. *De Montaigu*. (4) In *Mitford* v. *Mitford* (5) the country where the parties were domiciled was also the country where the marriage was celebrated. No doubt the rule contended for by the appellant is a simple and easy rule, but it imposes a great hardship on parties not immediately concerned, and it is subject to many exceptions. In its extreme form it is neither right nor supported by authority. The respondent avers—and for the present purpose his averments must be taken to be true—that there was here no conflict of interest between the husband and wife—no genuine fought out lis—and that the German Court proceeded upon a mistaken view of the French law. In the respondent's submission the German decree of nullity is not binding on the Scottish Court so as to preclude it from allowing him a proof of his averments.

[He also referred to Maclaren's Court of Session Practice, p. 231.]

Normand K.C. replied.

The House took time for consideration.

1927. May 27. VISCOUNT HALDANE. My Lords, this is an appeal from the First Division of the Court of Session. The interlocutor questioned recalled an interlocutor of the

(1) 2 Sw. & Tr. 67.
(2) [1908] P. 46, 79.
(3) [1913] P. 46.
(4) [1913] P. 154.
(5) [1923] P. 130.

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Lord Ordinary, Lord Morison, in an action of multiple poinding. The subject-matter was a fund consisting of moneys and shares in movable property held by the real raisers as bankers or agents. This fund was claimed by the appellant on the one hand and by the respondent on the other. The latter alleged that the fund was payable to him as being subject to a charge created by the Treaty of Peace (Austria) Order, 1920, on the footing that the appellant was then, in virtue of her marriage with Herr von Lorang, an Austrian national. The appellant replied that she had ascertained that her marriage was null and void, and that, therefore, she was never an Austrian national, and she obtained a sist or continuation of the proceedings in the multiple poinding which would give her time to bring a suit in Germany, the country of the domicil of Herr von Lorang and herself, to have the validity of the marriage ascertained.

In 1924 the Court at Wiesbaden gave judgment declaring the marriage to have been null and void. This decree was then produced by the appellant in the multiple poinding proceedings in the Scottish action. The Lord Ordinary gave effect to it, and dismissed the claim of the respondent. The First Division on appeal, by a majority, Lord Sands dissenting, recalled his interlocutor, and remitted to the Lord Ordinary to allow a proof before answer. The question before your Lordships is whether the judgment of the German Court was conclusive, or whether the invalidity of the marriage was still open to question by the Courts here at the instance of the administrator, who had not been a party in the German proceedings.

The history of the case may be stated briefly. The marriage of Herr von Lorang, who was then an Austrian subject, to the appellant, who was a British subject domiciled in Scotland, took place in June, 1897. In 1898 the pair settled in Germany, at Wiesbaden, and lived there as man and wife with a brief interruption of residence, due to the war, until the end of 1923. Undoubtedly Wiesbaden had become the place of their domicil. The respondent claimed the fund, and the action of multiplepoinding was instituted

in December, 1923. The appellant resisted the claim of the respondent and took proceedings in the German Court of their domicil, traversing the validity of her marriage. She averred that she met Herr von Lorang at Wiesbaden in 1896 and became engaged to him. Had they been married by a religious ceremony in Austria, the country of his nationality, they would have had to undertake to bring up any children in the Roman Catholic faith. This they both desired to avoid. On the other hand, merely civil marriage in Austria would not have been agreeable to Herr von Lorang's friends there. Consequently they decided that their marriage should take place in Paris. The appellant pleads, in the present action, that she had only recently discovered that her marriage in Paris was null and void, for the reason that the parties had not observed the formalities of residence and publication which the French law required, and because the registrar in Paris had been induced to perform the marriage ceremony upon the faith of a certificate to which she was no party, under the hands of Herr von Lorang and the jurisconsult of the Austrian Embassy, which stated, what was untrue, that Herr von Lorang was domiciled in France and was not obliged to publish the marriage in Austria. It made no difference, according to her, that the marriage was also celebrated at the English Church in Paris, according to the rites of the Episcopal Church of England. The proceeding in the Court at Wiesbaden was commenced by petition of the appellant against Herr von Lorang. The latter appeared and was represented by an advocate, but he took no active part in the proceedings. In the result the Court, acting on the principle locus regit actum, declared the marriage null and void. The evidence of Professor Brunet, a qualified French jurist, was taken. The Court satisfied itself that the marriage had been constituted neither in accordance with the conditions required by French law nor in accordance with those required by the law of the domicil. No later French law which would apply nor any circumstances had cured the invalidity thus brought about. The respondent was not a party to these Wiesbaden proceedings.

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The final decree of the German Court of the domicil was produced in the Scottish action, in which the Court was asked to give effect to it. The present respondent, as I have just stated, did not appear in the German proceedings. But in the Court of Session he claimed that he was entitled to have their validity, as against himself at least, investigated, notwithstanding that the parties to them, Herr von Lorang and his wife, were domiciled in Germany and not in Scotland.

My Lords, I do not think that there are any materials before us on which exception can be taken to the judgment in Germany as having been obtained by what amounts in law to collusion. I will assume that both the husband and his wife had as their main motive to obtain that judgment in order, if possible, to avoid the application of the Austrian administrator's title to claim, but I think that, on the grounds assigned by the Lord Ordinary and Lord Sands, if they had the legal right to do this the motive for which they exercised it could make no difference in a case in which fraud practised on the German tribunal is not now alleged, and no collusion in any attempt to deceive that tribunal is established. The real question is simply whether the Court of the domicil was competent to dispose conclusively and finally of the question before it. If so it does not matter in law whether it had an exclusive jurisdiction. Had the question been one of divorce for adultery there could to-day have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the Court of their domicil is the appropriate Court, and its decision is treated by our Courts as not only being valid but as conclusive. The case before us is, however, not one of dissolving an existing marriage but of deciding that no valid marriage ever took place. The marriage was declared by the Court of the domicil to have been void by reason of non-compliance with the formalities required by the law of France, where it was celebrated. If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties

as having been a judgment in rem. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement inter se to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of. There is nothing unusual in this doctrine.

I cannot see how, for instance, a husband could plead as a good answer to a claim for necessaries supplied to his wife that the marriage which had been publicly celebrated was one which he was entitled if he took proceedings to have declared void for either impotency or for want of compliance with formalities which the public authority which had celebrated the marriage had assumed to have been complied with. For the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities. The disability of monastic celibacy, for example, or that of a minor, or that of consanguinity, may be binding by the law of one country so as to invalidate the married status, while not binding by that of another. When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, it is necessary to determine the law by which they are fixed. It may be going too far to assert that these are all recognized in this country as referable only to the law of the domicil. But

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at least it is now established, since the decisions in *Le Mesurier* v. *Le Mesurier* (1); *Lord Advocate* v. *Jaffrey* (2); and *Attorney-General for Alberta* v. *Cook* (3), that for a decree of dissolution of a marriage the Court of the domicil is the true Court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive. But for the purposes of the present case it is not necessary to refer to the point, for if the German Court was competent to pronounce the judgment it did in the case before us the judgment, being that of the Court of the domicil, was conclusive in our Courts here, so far as competency is concerned, unless there is something in the decree of dissolution for nullity which distinguishes such a proceeding from one for divorce for adultery. In *Niboyet* v. *Niboyet* (4), in which the judgment of the majority of the Court is no longer law, Brett L.J., in the dissenting judgment which he delivered, observed that the Court of the domicil was the only Court that was entitled to alter the status of married people; but he went on to indicate that the principle, while it applies so as to include suits for judicial separation and for restitution of conjugal rights, did not apply to suits for a declaration of nullity. He gives no reasons for saying this. Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German Court was competent as against all other Courts conclusively to declare the marriage in the present case void. I am unable as matter of principle to see how its competence as the Court of the domicil can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the question raised that status must

(1) [1895] A. C. 517.
(2) [1921] 1 A. C. 146.
(3) [1926] A. C. 444.
(4) 4 P. D. 1.

be taken to have been a res and the judgment was therefore one in rem.

My Lords, if the status in question was a res within the meaning of the principle, the duty of our Courts is clear. In *Castrique* v. *Imrie* (1) this House, adopting the language of Blackburn J., who was one of the judges who advised it, laid down that the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide on the disposition of the thing, and the Court has acted within its jurisdiction.

In the careful judgment he delivered in the First Division the Lord President holds that the principle so laid down applies to a decree of divorce, making it conclusive of the dissolution of the marriage, at all events if the ground of the divorce was one or other of those recognized by the law of Scotland—namely, adultery or desertion. But he limits the application of the principle. It applies, in his view, to a decree of judicial separation, for this alters the married status; it applies also to a decree of declaration of marriage. He thinks, too, that a decree of nullity founded on the impediment of impotency also falls within the principle. This is, indeed, in his view, not a bar to the constitution of marriage, but only a resolutive condition of the contract, invalidating by non-performance a marriage that was complete, and assimilating the case to divorce. But the Lord President goes on to say that, as in other instances, nullity proceedings on certain grounds may be instituted by third parties having interest, the principle under discussion cannot be one of universal application. He therefore thinks that a sentence of nullity on the ground of insanity, propinquity, prior marriage, or non-compliance with the lex loci, is not a judgment disposing of married status and so a judgment in rem, notwithstanding that the sentence, if obtained in an action in which the pretended spouses are the parties,

(1) L. R. 4 H. L. 414.

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may be res judicata as between themselves. It seems, he says, plain that the competency of such actions by third parties having interest, such as the respondent here, cannot spring from the intention of the persons who were parties to the pretended marriage; nor does the force of the decree pronounced in them necessarily depend on its being given by the Court of the pretended husband's domicil. Even accepting this, I do not think that the proposition is at all conclusive on the particular question before us.

My Lords, I do not find the judgment of the Lord President convincing, and am compelled to prefer the other view worked out by Lord Sands. There does not appear to be any reason why a judgment of nullity, even on such restricted grounds as the Lord President mentions, should not be regarded as disposing of the status of married persons. It does not do so the less because third parties may have it open to them to litigate elsewhere questions of validity in certain restricted instances before such questions have been disposed of in the Court of the domicil. Such status is not dependent only on the contract of the parties to the marriage. Before Lord Lyndhurst's Act, for example, a man and woman in England standing in an affinity within the prohibited degrees might marry, and the marriage, though voidable, could only be got rid of by the sentence of an Ecclesiastical Court pronounced within the lifetime of the parties. But the status though voidable was not the less a status, a res with which the Court could deal. That shows that though voidable and not void, it was that as to which the sentence of the appropriate Court was essential for its dissolution.

My Lords, for these reasons I am unable to agree with the view of the Lord President that the foreign judgment in the case before us did not as soon as given establish conclusively against the respondent and every one else that the appellant, at the relevant date in the multiplepoinding proceedings, was not an Austrian national qua wife of an Austrian subject. If so, the claim of the administrator in the multiple poinding became inept on March 28, 1924, the date of the decree of the Wiesbaden Court, which was made final on May 4 in that

year. The interlocutor of the Lord Ordinary repelling the claim for the administrator was not pronounced until April 21, 1925, and ought accordingly to receive effect.

There were cited numerous authorities for the contention of the respondent in the Court of Session. These I have examined, but they do not appear to me to modify the conclusion at which I have arrived as to the principle which must be applied. In considering them it should be borne in mind that some of the dicta in the older cases have been affected by the English Divorce Act of 1857, which for the first time enabled divorce a vinculo to be granted by a Court of general law in England. Before that year it was the prevalent view that a marriage duly celebrated in England could not be got rid of (except by Act of Parliament) validly so far as England was concerned, even by a foreign decree, at least when the domicil at the time of the marriage was English. In the report of *Warrender* v. *Warrender* (1) *Lolley's Case* (2), which had been decided by eminent English judges, is explained, and it is yet more precisely explained by Lord Westbury in *Shaw* v. *Gould* (3), and by Lord Selborne in *Harvey* v. *Farnie.* (4) *Lolley's Case* appears in reality to have turned on domicil as much as on the indissoluble character of an "English marriage." After 1857 the indissoluble character of an English marriage disappeared, and the effect of this disappearance is noticeable in the later decisions. In the judgment in *Le Mesurier* v. *Le Mesurier* (5) the modern doctrine of domicil as the true test prevails unrestrainedly.

Turning to some of the authorities cited, a beginning may be made with a case in which the only question was as to the jurisdiction of the Consistorial Court in England to inquire into the validity of a sentence of a foreign Court declaring a marriage to have been illegal by reason of non-compliance with the lex loci contractus of the foreign country where it was celebrated. There is very little in the judgment there which even touches the point before us. *Scrimshire* v.

(1) 2 Cl. & F. 488, 567.
(2) (1812) 2 Cl. & F. 567; Russ. & Ry. 237.
(3) (1868) L. R. 3 H. L. 55, 85.
(4) (1882) 8 App. Cas. 43, 54.
(5) [1895] A. C. 517.

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Scrimshire (1) was a suit in which the validity of a foreign marriage was denied on the ground that it had not been celebrated according to the law of the country in which it was celebrated. This was held to have been proved by a sentence to that effect of nullity in France, and by the evidence. As the marriage appeared to have been illegal by the lex loci contractus, the decree here was against the validity, but inquiry in the Consistorial Court in England was admitted. *Scrimshire* v. *Scrimshire* (1) is a relevant authority, but the result was not based on principles relating to domicil, which in 1752 were obscure but to-day are well established.

In *Sinclair* v. *Sinclair* (2) before Lord Stowell, at that time Sir William Scott, the respondent pleaded, as an answer to a suit by his wife for separation on the ground of cruelty and adultery, that the marriage had been celebrated at Paris, and had been dissolved by a sentence of the Court at Brussels on the ground of nullity. The parties were not domiciled at Brussels. The marriage appears to have been really celebrated in England. As the parties were within the English jurisdiction Sir William Scott considered that the Consistorial Court could examine the validity of the marriage. He thought that it was to go too far to hold that a sentence of nullity (the reasons for the nullity do not appear) would not carry great weight if sentence were pronounced in the country where the marriage was solemnized. But he was not prepared to say that a judgment of a third country on the validity of a marriage not within its own territories nor had between subjects of that country would be universally binding. He decided that there was no foreign sentence which would prevent the Consistorial Court from entertaining the suit.

In *Kennedy* v. *Earl of Cassillis* (3) a note is quoted extracted from the MSS. of Lord Nottingham L.C. He says, referring to the case of *Cottington*, that where a woman claimed to be a lawful wife here, although she was said to have already a husband living in Turin, on the ground that she

(1) (1752) 2 Hag. Con. 395. (2) 1 Hag. Con. 294.
(3) 2 Swans. 313, 323, 326.

had been divorced from that husband by the Archbishop of Turin, he, Lord Nottingham, had held that it was against the law of nations not to give credit to the judgment and sentences of foreign countries. For what right had one kingdom to reverse the judgment of another? What confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences! This is an authority, so far as it goes, which supports the contention of the appellant here.

Simonin v. *Mallac* (1) was a petition for nullity. The petitioner (the wife) was married to her husband in England. Both were of French domicil, and they had come here only to be married. She obtained a decree of nullity in France on the ground of want of parental consent and of publication. She then came to reside in England and petitioned for a declaration of nullity here. Sir Cresswell Cresswell held that as her marriage had been solemnized in England, the parties had contracted with reference to the law of this country as to validity. He decided that he had jurisdiction. This decision was given in 1860, but the marriage took place before the Divorce Act of 1857.

In considering the application of other authorities cited to us it is essential to bear in mind the limited scope of the only question before us. It is simply whether, when the Court of the domicil of both the parties has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a Court here where they are not domiciled can review that decision. The reasons given by Lindley M.R. in *Pemberton* v. *Hughes* (2) are, in my opinion, conclusive against any attempt to reopen any such case on the footing of supposed irregularity of procedure. Our Courts, as he says, never inquire whether a competent foreign Court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed. In the present case the question was not divorce by way of dissolution for any offence but because of nullity for want of essentials required for the contract. It is said

(1) 2 Sw. & Tr. 67. (2) [1899] 1 Ch. 781, 790.

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that this makes a difference, inasmuch as the marriage if a nullity could not change the domicil of the supposed wife. That is possibly true, on the grounds assigned by the then President of the Divorce Court, Sir Gorell Barnes, in his elaborate judgment in *Ogden* v. *Ogden*. (1) But it does not affect the litigation before us, in which the decree of nullity in the Court of the husband's domicil was pronounced with retrospective effect before the claim of the Administrator of Austrian Property could be established. None of the cases cited to us seem to me to affect this simple point.

My Lords, for the reason that the judgment of the Wiesbaden Court was both competent and binding upon us, I think that we ought to recall the interlocutor of the First Division and to restore that of the Lord Ordinary. The appellant should have her costs in the Inner House and here. I move accordingly.

VISCOUNT DUNEDIN. My Lords, although I had made up my mind as to what, according to my opinion, the judgment of the House ought to be in this case, yet before I had penned a single sentence of the opinion which I should deliver, I had the advantage of reading the opinions of the noble Viscount on the Woolsack and of Lord Phillimore. Agreeing as I do with these opinions and also with every word of what I may without offence term the exceedingly able judgment of Lord Sands, if this were an ordinary case I should simply announce my concurrence. But the case is so important to the law that I need not apologize for adding some remarks of my own ; only, as it would be useless to retrace the ground so thoroughly explored in the opinions mentioned, these remarks will be necessarily discursive, but I hope may serve some purpose.

First I would like to say that I thoroughly endorse the view of Lord Phillimore that the outlook of the English Courts was necessarily different before and after 1857. I would like to add that I think there is another date of great moment, namely, the date of the decision of *Warrender* v.

(1) [1908] P. 46, 78.

Warrender (1) in this House, namely, 1835. I may add that besides the citation given by the noble Viscount the case is also very fully reported in 2 Shaw and Maclean, p. 154. Now I venture to say this: that before that judgment, without my considering whether it really was the law or not, any English lawyer would have said that the law of England is, that an English marriage is indissoluble by any Court; it is something that cannot be broken, indissoluble in essence, and looking to *Lolley's Case* (2), who could say he was wrong? I think satisfactory proof of this may be found in the argument of Sir John Campbell A.-G., afterwards Lord Chancellor, in the *Warrender* case, wherein he says (3): "It may be considered as absolutely certain that the bar of England could not have furnished a single counsel who would have set his name to the opinion, that judicial indissolubility was not a legal quality of every English marriage." But when *Warrender's* case (1) was decided, that, as an abstract proposition, could no longer hold, though I doubt whether the majority of English lawyers appreciated it. They did not in those days pay much attention to Scotch cases. Besides, as a decision it did not necessarily say *Lolley's Case* (2) was wrong, because Lolley was an Englishman and only went to Scotland for the purpose of obtaining a divorce, while Warrender was a Scotchman. In other words, if the law of *Le Mesurier* (4) had then been fully known, Lolley's divorce in Scotland was no divorce at all. No one can read Lord Brougham's judgment (2) without coming to the conclusion that he thought *Lolley's Case* (2) was wrong in what it laid down, and when Lord Lyndhurst twitted him with having gone out of his way to approve *Lolley's Case* (2) in *M'Carthy* v. *De Caix* (5) when he was Chancellor, Lord Brougham retorted that he was then only sitting in Chancery, and was bound by *Lolley's Case* (2), but now he was in the House of Lords and was not. My Lords, I do not think it necessary to consider whether I should follow the iconoclastic tendencies of my fellow-countryman.

(1) 2 Cl. & F. 488.
(2) 2 Cl. & F. 567.
(3) 2 Sh. & Macl. 170.
(4) [1895] A. C. 517.
(5) (1831) 2 Cl. & F. 568; 2 Russ. & My. 614.

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All I want to point out is that I think all early English decisions, certainly up to 1835, and I think up to 1857, must be read in the light of the general opinion of the indissolubility of an English marriage.

The other point on which I want to say a few words is the question of what is a judgment in rem. All are agreed that a judgment of divorce is a judgment in rem, but the whole argument of the majority of the judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a "res," as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the Court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no res. Now it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford dictionary the word "status" is defined (inter alia) as "The legal standing or position of a person . . . . condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority." The judgment in a nullity case decrees either a status of marriage or a status of celibacy.

The learned judges rest strongly on what was said on the subject in *Ogden* v. *Ogden* (1), but, first, I am not bound by *Ogden* v. *Ogden* (1), and so far as the dicta contradict what I have just said, I do not agree with them. And, further, a close perusal of the judgment in *Ogden* v. *Ogden* (1) will show that it is very much wrapped up with the question of jurisdiction, and if the first marriage was null, there was no jurisdiction in the French Court against the so-called wife defending. But here the jurisdiction is undoubted. On this point I would cite the words of Sir James Hannen

(1) [1908] P. 46.

in the case of *Turner* v. *Thompson* (1): "A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband, if she lives with him in the country of his domicil. There is no ground here for contending that she did not take up that domicil. She had the intention of taking up her permanent abode with him, and of making his country her permanent home." These words exactly fit this case. I am therefore of opinion that a decree of nullity savours of a res just as much as a decree of divorce. I accept the conditions laid down by Lord Lindley when he was Master of the Rolls in *Pemberton* v. *Hughes*. (2) In order for a foreign decree to be immune from disturbance by an English Court —and in my opinion Scottish may with perfect justice be substituted for English—it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the Court is competent to deal, and it must not offend against English ideas of substantial justice.

Although, as I said before, these remarks are discursive, and I do not wish to retrace traversed ground, yet I would put in the form of short propositions the points I hold proved, the proof of several of them being worked out, not by me, but by the opinions of my noble and learned friends.

1. The German Court had jurisdiction over the parties, they being domiciled in Germany equally whether there was marriage or no marriage.

2. This was a genuine action, and there was no collusion or fraud used to deceive the German Court.

3. The validity of the marriage depended on French law, that being the law of the locus celebrationis.

4. The German Court took proper steps to inform itself of the French law, and gave judgment according to the law proved before it.

5. That judgment is a judgment which is equivalent to a judgment in rem, and is therefore binding on the Scotch Court without further inquiry.

(1) 13 P. D. 37, 41. (2) [1899] 1 Ch. 781, 790.

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It follows that I agree with the motion made from the Woolsack.

LORD PHILLIMORE. My Lords, I have read and I concur in the opinions of Viscount Haldane and Viscount Dunedin.

With regard to the respect to be paid to the judgment of a Court having jurisdiction over the place where the parties are domiciled, it is suggested that the English decisions, though not strictly authoritative, may, in the comparative dearth of Scots authorities, be looked upon as declaring common British law, or that at any rate they may be regarded as authorities on international law; and the Administrator of Austrian Property contends that they show that the Court before which a matrimonial suit is tried will not regard a previous decision of the Court of the domicil as conclusive. Counsel for the lady appears to concede that this may be the result of the English decisions, but they say that this is a special English view applying only to English marriages. Whether this means putative marriages solemnized in England, or such marriages solemnized elsewhere between two English persons or applies to both cases, did not clearly appear in the argument. I think that this matter requires a further analysis.

There are two classes of decisions affecting the matrimonial status: those which decide that a putative marriage is or is not valid, judgments of declarator or of nullity, and those which put an end to an unquestioned marriage, judgments of dissolution of marriage or, in popular language, divorce. With regard to these latter, English Courts before 1857 would, from their nature, be inclined to refuse to recognize a decree of dissolution of marriage, because in their view of the law marriage (matrimonium verum et ratum) was indissoluble. They were Church Courts, and the law of the Church so taught them. Neither they nor foreign Courts, in their view, could break the indissoluble chain. It was only in obedience to the so-to-speak brute force of a private Act of Parliament that they submitted to recognize a dissolution. And this

law of the Church was the marriage law of England. Hence the decision in *Lolley's Case*. (1)

It was perhaps conceivable, if people got into a strange country where non-Christian views or different views of Christianity prevailed, and became domiciled there, that the sentence of dissolution by the appropriate Court of the country might be accepted. Lords Brougham and Lyndhurst in *Warrender* v. *Warrender* (2) thought that this would not be so and that *Lolley's Case* (1), which was that of a domiciled Englishman making a temporary stay in Scotland in order to give the Scots Courts jurisdiction, would have been decided in the same manner even if Lolley had become domiciled in Scotland. It is however the fact, as Lord Cranworth points out in *Dolphin* v. *Robins* (3), that Lolley certainly had not a Scotch domicil.

However this may have been before 1857, circumstances entirely changed, when instead of a number of Church Courts there was established one statutory Civil Court empowered and instructed to grant decrees of dissolution of marriage in certain cases.

Since 1857 there was no reason why the Court for Divorce and Matrimonial Causes while it existed, and since then the English High Court of Justice in its Matrimonial Division, should refuse to recognize a decree of dissolution of marriage made by the Court of the matrimonial domicil, at least on any ground which would be deemed sufficient by the present English law and possibly upon any ground deemed sufficient by the law of the domicil: see Phillimore's Commentaries upon International Law, vol. iv., section 507.

Indeed this matter is now set at rest. Since the opinions expressed in the cases of *Le Mesurier* v. *Le Mesurier* (4) and the *Lord Advocate* v. *Jaffrey* (5), and the decision of the Privy Council in *Attorney-General for Alberta* v. *Cook* (6), it is established that the law of England recognizes the competence and the exclusive competence of the Court of the domicil

(1) Russ. & Ry. 237.
(2) 2 Cl. & F. 488.
(3) (1859) 7 H. L. C. 390, 413.
(4) [1895] A. C. 517.
(5) [1921] 1 A. C. 146.
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to decree dissolution of a marriage. The last case, though in form a decision upon the law of the Province of Alberta in Canada, is authoritative as a decision upon the law of England, because it had been previously determined in the case of *Board* v. *Board* (1) that the matrimonial law of Alberta is that of England.

It may now be taken that the decision in *Niboyet* v. *Niboyet* (2), where the Court of Appeal by a majority reversed the decision of Sir Robert Phillimore, is not sound.

I pass from executive decrees to deliberative pronouncements—decrees of declarator or of nullity. The first authorities to be considered are those of *Scrimshire* v. *Scrimshire* (3) and *Sinclair* v. *Sinclair*. (4) In both cases a ceremony of marriage was gone through in France between English subjects domiciled in England. In both the parties continued so domiciled. In both there was a decree of nullity by a foreign Court, which was set up by the man as a defence to matrimonial relief claimed by the woman.

In *Scrimshire* v. *Scrimshire* (3) the man did not rely upon the decree of nullity as conclusive. He pleaded facts and the law of France, the lex loci celebrationis, according to which the marriage was null, and (it being the course of procedure in the Ecclesiastical Courts, to plead evidence) he pleaded the French decision as the best evidence of the French law (it was so done later in *Simonin* v. *Mallac* (5)), and upon the whole matter the Court decided in his favour.

In *Sinclair* v. *Sinclair* (4) the woman relied not merely upon the French ceremony but also upon a subsequent marriage which she said had been solemnized in England, and she claimed a divorce a mensa et thoro by reason of her alleged husband's adultery, no doubt expecting to get alimony. The case, so far as it is reported, was tried upon the preliminary objection of the man that the Court had no jurisdiction,

(1) [1919] A. C. 956.
(2) 3 P. D. 52; 4 P. D. 1.
(3) 2 Hag. Con. 395.
(4) 1 Hag. Con. 294.
(5) 2 Sw. & Tr. 67.

because the woman was disentitled by reason of a decree of a Court in Flanders given against her, both in respect of nullity and in respect of her adultery.

This latter finding, though not an objection to the jurisdiction and therefore improperly relied upon at this stage, would have been a good defence to the woman's claim for relief. But the judge, Sir William Scott, after commenting upon the grotesqueness of such a joinder of causes of suit, came to the conclusion that it was not proved, at any rate at that stage, that there had been a decree against the woman for adultery. The historical circumstances of the condition of Flanders at that moment rendered certainty in these matters difficult of attainment.

If the alleged decree against the woman for adultery was not proved, the decree, if that were a real one, of nullity would be at this stage of no avail to the man, because the woman was relying upon the double ceremony and the man did not suggest that the Flanders decree had been given upon anything but the French ceremony. There could be no doubt, therefore, that the man's protest to the jurisdiction had to be overruled and that he must be put to answer in the usual way the case that was made against him. We do not know what followed. However, in the course of his judgment, Sir William Scott made use of language which, owning to the great respect always paid to that eminent judge, has been treated as weighty. He does seem to speak as if in matrimonial cases where the validity of the marriage was in dispute, the Court would not consider itself concluded by any previous decision of any other Court even when rendered between the same parties, but would look at such decisions merely as helps or guides or adminicula of proof. If and so far as it was a matter of the law of France as the place of the alleged celebration, he would have regarded, it would appear, the decree of a French Court as valuable evidence of French law, in the same way that Sir Edward Simpson treated the French decision in *Scrimshire* v. *Scrimshire*. (1) But it would seem as if this was all the

(1) 2 Hag. Con. 395.

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weight that Sir William Scott could attach to it even if it were the Court of the domicil of the parties.

When, however, one remembers that in the case with which he was dealing, as in the case of *Scrimshire* v. *Scrimshire* (1) (which he probably had in his recollection), there was no question of a sentence by the Court of the domicil, one can see that it may well be a mistake to apply his language generally.

At that time there was no one matrimonial Court in England. There were as many Courts as there were dioceses, and indeed more, because there were some special jurisdictions; and he cannot have thought that, if there had been a decree of nullity procured by a man living in the diocese of London who afterwards removed and made his domicil in Southwark, the Court of the Bishop of Winchester would not, if the question were raised either by the same woman or by another woman relying upon a subsequent marriage, be concluded by the decree of the Chancellor of London.

The next case, occurring after a long interval, which bears upon this matter seems to be *Simonin* v. *Mallac*. (2) Rightly understood this case does not seem to be an authority for the proposition that an English Court in the case of a putative English marriage will not treat the decision of the Court of the domicil of the parties as conclusive.

These were two French people who came over to Dover to celebrate an English marriage and returned to France where they were both always domiciled, and where, as the man refused to ratify the marriage by a French ceremony, the woman sued in the French Court and got a decree of nullity, and then, not content with that decree, sued also in the English matrimonial Court for a similar decree. It was an unusual proceeding. It was not like the usual suit on a foreign judgment where execution is sought in this country, nor was it a case like those which I have mentioned, in which a foreign decree of nullity was set up as a bar to application for matrimonial relief.

(1) 2 Hag. Con. 395. (2) 2 Sw. & Tr. 67.

When the petition is looked at it will be seen that the lady did not rely on the foreign decree as conclusive. She set out facts, including the French law, and the French decree as evidence of the French law, just as it had been used in *Scrimshire* v. *Scrimshire* (1), and then proceeded to submit that the law governing the validity of marriage was the law of the domicil of the parties and not the lex loci celebrationis. Thereupon the decision of the Court, right or wrong, was upon this issue only. The judges held that, at any rate in respect of the particular defect alleged (impedimentum impeditivum) the law of the place of celebration prevailed over the law of the domicil. It may be said that the Court ought to have guarded itself in respect of the French sentence of nullity, but inasmuch as it was not invited to hold this sentence as conclusive but to examine the matter for itself, it is not to be wondered at that the Court did not take this point.

The English decision which goes furthest in support of the conclusion arrived at by the Court of Session is *Ogden* v. *Ogden* (2), in which case the Court of Appeal disregarded the sentence of the French Court, which was the Court of the man's domicil, and proceeded to hold that a marriage celebrated in England between a competent English woman and a Frenchman who was capable of marrying her but could not validly marry her at the moment according to the law of France for want of the necessary consents, was a valid marriage, notwithstanding that the French Court had pronounced it null. The impediment was, it is to be noted, an impedimentum impeditivum and not an impedimentum dirimens, such as consanguinity or a colour bar.

This authority looks at first sight as if an English Court would not in the case of an English marriage hold itself concluded by the decision of a foreign Court though the latter was the Court of the domicil. But in truth the problem in *Ogden* v. *Ogden* (2) was almost insoluble. The short cohabitation between the parties which followed the ceremony of marriage did indeed take place in England, but after this

(1) 2 Hag. Con. 395. (2) [1908] P. 46.

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very temporary residence the man returned to his home in France and never lost his French domicil. On the other hand the woman did not follow the man to France and, if she were not married to him, never acquired a French domicil. To treat her as domiciled in France would be to treat her as a wife, who takes her necessary domicil from her husband. But the French Court proceeded to say that she was not a wife, and when the suit of *Ogden* v. *Ogden* (1) came on that was, and necessarily was, her contention.

The President, Sir Gorell Barnes, insists upon this point at p. 78 of the report, and therefore took the French decree, as he expressed it, as only a declaration of the status of the parties in France. The French decision could not be relied upon as res inter partes judicata, for it was being questioned by the second putative husband, and the woman could not set it up as a judgment in rem by the Court of her domicil. Moreover it was clear that the Court of her own domicil never would have held the marriage null.

To these observations upon *Ogden* v. *Ogden* (1) I should add that the case was unfavourably commented upon in the judgment of the Privy Council in the *Attorney-General for Alberta* v. *Cook* (2), and that, whether it were a right or a wrong decision upon the very peculiar facts of the case, I cannot regard it as an authority that English law would not recognize the decision of a competent Court having jurisdiction over the place where the parties are domiciled as final and conclusive.

As to the general principles of international law upon this subject as viewed by British Courts it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the Court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively. I have used the expression "the law which determines the personal status" because there are countries which would refer to nationality rather than to domicil; but the principle is the same.

(1) [1908] P. 46. (2) [1926] A. C. 444.

The text first quoted in *Shaw* v. *Gould* (1) and then cited in *Le Mesurier* v. *Le Mesurier* (2), and in *Lord Advocate* v. *Jaffrey* (3), was not, I apprehend, intended to be confined to decrees which effect something, but deals also, if not primarily, with decrees which decide upon the existing status. "Quum de statu et conditione hominum quaeritur uni solummodo judici et quidem domicilii universum in illo jus est attributum."

My Lords, there is no reason for supposing that the law of Scotland differs in this respect from general international law. The passage in *Longworth* v. *Yelverton* (4), where the reason given for refusing to put in force the special Scotch process of referring an issue to the conscience of the other party was that a judgment of declarator of marriage would thus be obtained on a personal admission, and yet nevertheless as a judgment in rem or a judgment upon personal status would be binding on a new wife, indicates sufficiently the trend of Scottish law.

I do not think that the case of *Murison* v. *Murison* (5) or even the obiter observations which occur in the judgments affect this conclusion.

Finally, my Lords, if the Court is a competent Court, still more if it is the only competent Court—and in my opinion the Wiesbaden Court was the only competent Court for these parties—its judgment must, for the very reason of the thing, be such a judgment as that described in *A.* v. *B.* (6), a "definitive decree declaring a marriage void, which should be universally binding and which should ascertain and determine the status of the parties once for all."

My Lords, I cannot conclude this delivery of my opinion without one cautela or reservation. If it could be said on behalf of the Administrator that this was a collusive suit and a judgment procured by collusion, it would, in my view, be unavailing. As the Solicitor-General said in the *Duchess of Kingston's Case* (7): "Fabula, non judicium, hoc est; in

(1) L. R. 3 H. L. 55, 83.
(2) [1895] A. C. 517, 538.
(3) [1921] 1 A. C. 146, 152.
(4) 5 M. (H. L.) 144, 147.
(5) 1923 S. C. 624.
(6) L. R. 1 P. & M. 559.
(7) (1776) 20 St. Tr. 355, 479.

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scena, non in foro, res agitur." I should lay such a judgment aside. But I agree with the Lord Ordinary and the Lord President that no such collusion is suggested in this case as amounts to a case of fraud upon the German Court. No doubt the parties desired that the German Court should pronounce the marriage null. But it is not suggested that any false evidence was given or that any material evidence was designedly excluded, or that the opinion of the advocate on the French law was not the honest opinion of a competent person, though it may or may not have been correct.

For these reasons I concur with your Lordships in holding that the interlocutor of the Court of Session should be set aside and the judgment of the Lord Ordinary restored.

LORD BLANESBURGH. My Lords, the difficulty in this appeal, as I see it, has been not so much to determine whether a decree of nullity pronounced by the Court of the domicil of the parties is in ordinary circumstances conclusive everywhere. It has been to determine whether in the unusual circumstances and reactions of the nullity suit in the present case the Wiesbaden decree made in it is outside the general rule, at least so far as the Court of Session in this action of multiple poinding and at the instance of the Administrator of Austrian Property is concerned. My Lords, I confess that if it had not been for the complete exposition of the case in all its aspects and from all points of view which is to be found in the weighty judgments of the Lord President and Lord Sands, the difficulty I have experienced in reaching a decision entirely satisfactory to myself might, in the special circumstances here existing, still have remained unresolved.

But, having examined and re-examined these judgments with all the care of which I am capable, and being assisted to a conclusion also by the fuller analysis of the English authorities which has been made in this House, I now see no effective answer to the conclusions reached by Lord Sands or to the reasoning by which he supports them.

Accordingly, I concur in the motion which has been made by the noble Viscount on the Woolsack.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading the opinions pronounced by the noble Viscount on the Woolsack and by Viscount Dunedin and Lord Phillimore. I agree with their reasoning and conclusions and I have nothing to add.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, May 27, 1927.

Agents for the appellant: *Thomas Cooper & Co., for John & W. K. Gair & Gibson, Falkirk, and Beveridge, Sutherland & Smith, W.S., Leith.*

Agent for the respondent: *Solicitor to the Clearing Office (Enemy Debts), for J. & R. A. Robertson, W.S., Edinburgh.*

[PRIVY COUNCIL.]

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WIGG AND ANOTHER . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE IRISH FREE STATE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE IRISH FREE STATE.

Irish Free State—Action against Attorney-General for Declaration—Transferred Civil Servants—Retiring Allowances—Supplemental Pensions—Statutory Provision for final Determination by Committee—Failure to appoint Committee—Treaty between Great Britain and Ireland, art. 10—*Constitution of Irish Free State* (*Saorstát Eireann*) *Act*, 1922 (*No. I. of* 1922, *I. F. S.*), *Sch. I., art.* 78—*Government of Ireland Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *s.* 55; *s.* 56, *sub-s.* 6; *sch.* 8.

Upon the establishment of the Irish Free State, the two appellants, who were established civil servants of the Crown, were transferred to the service of that State. They retired in consequence of the change of Government, and being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought an action against the Attorney-General for the Irish Free State claiming declarations as to their rights.

By art. 10 of a Treaty between Great Britain and Ireland, the Irish Free State agreed to pay fair compensation in terms not less favourable than those accorded by the Government of Ireland Act, 1920, to civil servants who should retire in consequence of the change of Government effected under the Treaty. Act I. of 1922, of the legislature of the Irish Free State, gave to the Treaty the force of law, and by art. 78 of the Constitution which it enacted transferred civil servants were to have the benefit of art. 10. The Government of Ireland Act, 1920, by sch. 8 enacted rules, modifying the provisions of the Superannuation Acts, 1834–1914, for ascertaining the retiring allowances of existing civil servants in Ireland; but, by s. 56, sub-s. 6, the determination of a Committee to be set up was to be conclusive as to the amount thereof. Owing to the establishment of the Irish Free State, no Committee had been set up for Southern Ireland:—

Held, that Act I. of 1922 of the Irish Free State gave to the appellants a legal right to the benefit of art. 10 of the Treaty enforceable in the Courts of that State, and that no Committee having been set up the duty of ascertaining the amount of compensation payable fell upon

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT DUNEDIN, and VISCOUNT FINLAY.

the Courts; the appellants could assert their rights by an action against the Attorney-General, as in *Dyson* v. *Attorney-General* [1911] 1 K. B. 410; [1912] 1 Ch. 158.

Cooper v. *The Queen* (1880) 14 Ch. D. 311 and *Yorke* v. *The King* [1915] 1 K. B. 852 distinguished.

Held, also, upon the true construction of sch. 8 of the Act of 1920: (1.) that the supplemental pensions payable to the appellants varied with the cost-of-living figures officially declared from time to time, further that the prescribed amount at the date of retirement was not an overriding maximum; and (2.) that the lump sum bonus due to the second appellant, who had elected to adopt the Superannuation Act, 1909, should be calculated upon the whole pension to which he was entitled at the date of his retirement, not upon 75 per cent. thereof.

Judgment of the Supreme Court of the Irish Free State [1925] 1 I. R. 149 reversed and judgment of Meredith J. restored.

APPEAL (No. 29 of 1926) by special leave from a judgment of the Supreme Court of the Irish Free State, dated April 1, 1925, reversing a judgment of the High Court of Justice of that State, Chancery Division, delivered by Meredith J. on July 18, 1924.

The appellants, who were established civil servants of the Crown transferred to the service of the Irish Free State upon the setting up of that State, brought an action in the High Court of Justice of the State, Chancery Division, against the Attorney-General for that State, claiming certain declarations as to the allowances to which they were entitled upon retiring in consequence of the change of Government. Their main objections were to three conditions inserted in the awards to them by the Minister of Finance; it was not disputed that the figures in the awards were right, if the principles adopted by the Minister were correct.

The terms of art. 10 of the Treaty, and the statutory provisions relevant to the question whether the action could be maintained, appear from the judgment of the Judicial Committee. The amounts to which the appellants were entitled depended upon sch. 8 to the Government of Ireland Act, 1920, to which reference is made.

The action was tried by Meredith J., who rejected a contention that the action did not lie, and made declarations in the plaintiffs' favour.

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An appeal to the Supreme Court was allowed. The learned judges (O'Connor and Fitzgibbon JJ.; Johnston J. dissenting) held that the action was not maintainable. The appeal is reported at [1925] 1 I. R. 149.

1927. Jan. 27, 28. *Dickie K.C.* and *James Henry* for the appellants. The appellants had a legally enforceable right, since art. 10 of the Treaty was made part of the municipal law by art. 78 of the Constitution enacted by the legislature of the Irish Free State by Act I. of 1922. Both the Treaty and the Constitution were afterwards approved by the Imperial legislature. Any person to whom art. 10 applied could bring an action for a declaration that he was entitled to compensation under the article, also to have the proper amount declared: *Dyson* v. *Attorney-General* (1); *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (2) It is conceded that apart from the statutory right given no action would lie. In *Cooper* v. *The Queen* (3) and *Yorke* v. *The King* (4) the allowances were entirely within the discretion of the Treasury under the Superannuation Acts. It is true that in the present case s. 56, sub-s. 6, of the Act of 1920 made the determination of the Committee conclusive, but no Committee having been set up, it is for the Courts to determine the amount payable: *Wolverhampton New Waterworks Co.* v. *Hawkesford* (5); *Gould* v. *Stuart.* (6) On the true construction of sch. 8 of the Act of 1920 the appellants were entitled to the declarations claimed. [Reference was made to *Sutton* v. *Attorney-General.* (7)]

Overend K.C., *Bewley K.C.* and *Lavery* for the respondent. The appellants had no right in law enabling them to bring the action. The provisions in the Act of 1920 as to retiring allowances were based entirely upon the principle of the Superannuation Acts. Under those Acts the scale provided was a statutory maximum; the Treasury had a discretion

(1) [1911] 1 K. B. 410.
(2) [1915] A. C. 750.
(3) 14 Ch. D. 311.
(4) [1915] 1 K. B. 852.
(5) (1859) 6 C. B. (N. S.) 336, 556.
(6) [1896] A. C. 575.
(7) (1923) 39 Times L. R. 294.

which was final. That those Acts gave no right of action is clear from the cases referred to on behalf of the appellants and recognized by the House of Lords in *Considine* v. *McInerney*. (1) The Act of 1920 substituted the Civil Service Committee for the Treasury, maintaining the principle that there should be no legal right of action. No Civil Service Committee having been set up for Southern Ireland, the right of final determination rested with the Minister of Finance. Under the Provisional Government, Transfer of Functions Order, 1922, the Minister of Finance was in the position which the British Treasury would have occupied if the Civil Service Committee had not been created. Though a declaratory order can be made without giving any relief, it is well established that no declaration of right will be made if there is no jurisdiction in the Courts to give relief: *Barraclough* v. *Brown*. (2) The compensation awarded to the appellants was that provided by a minute of the British Treasury. If the action is maintainable, it is submitted that the awards were correct, and that the appellants are not entitled to the declarations prayed for.

Dickie K.C. replied.

May 3. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal by special leave from an order of the Supreme Court of the Irish Free State, reversing (by a majority) the judgment of Meredith J. in favour of the appellants.

The appellants, who were formerly established civil servants in the employment of the Crown in Southern Ireland, were, by the several instruments which effected or followed upon the establishment of the Irish Free State, transferred to the service of that State. They have since retired, and, being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought this action in the High Court against the Attorney-General of the Free State, claiming a series of declarations as to the allowances to which they

(1) [1916] 2 A. C. 162. (2) [1897] A. C. 615.

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are entitled. Meredith J., by whom the action was tried, granted part of the relief claimed; but, on appeal to the Supreme Court that Court by a majority (Johnston J. dissenting) held that the action would not lie, and dismissed it with costs. Hence the present appeal.

On the argument of the appeal before this Board two distinct questions were discussed—namely, first, whether the appellants are entitled to any legal rights in respect of which an action for a declaration will lie against the Attorney-General, and, secondly, whether, assuming that such an action will lie, the appellants are, on the true construction of the statutes relating to superannuation or compensation for loss of office, entitled to the declarations which they claim. The questions so raised are of considerable public importance, both as bearing on the effect to be given in the Courts of the Free State to the statutes and orders of 1922, and also as affecting the interests of a large number of former servants of the Crown.

Upon the first question the respondent relied in the first place on the decisions of the English Courts which have laid it down that a servant of the Crown has no right under the Superannuation Acts to sue for his superannuation allowance; and for this purpose reference was made to the cases of *Cooper* v. *The Queen* (1) and *Yorke* v. *The King*. (2) Their Lordships do not question the authority of those decisions, which, indeed, was recognized by the House of Lords in *Considine* v. *McInerney* (3); but those cases turned entirely upon the language of the Superannuation Acts. Sect. 30 of the Act of 1834 (which has not been repealed) enacts that "nothing in this Act shall etxend or be construed to extend to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under this Act," and s. 2 of the Act of 1859 provides that any question as to a claim for superannuation shall be referred to the Commissioners of the Treasury, "whose decision shall be final"; and, in view of these enactments, it was

(1) 14 Ch. D. 311. (2) [1915] 1 K. B. 852.
(3) [1916] 2 A. C. 162.

clear that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. But the claim of the present appellants rests, not upon the Superannuation Acts taken by themselves, but upon those Acts as modified and applied by the Agreement for a Treaty between Great Britain and Ireland and the statutes and orders of 1922.

By art. 10 of the Agreement for a Treaty it was provided as follows: "The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of police forces, and other public servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof."

That article, taken by itself, might not have been enforceable by an individual citizen in the Irish Courts; but by a series of enactments following upon the Agreement for a Treaty, it has been made a part of the municipal law of the Free State. By the Provisional Government (Transfer of Functions) Order, 1922, cl. 7, it was provided as follows: "(i.) All officers who are on the day of transfer engaged or employed in the discharge of functions transferred under this Order to the Provisional Government shall be transferred to and become officers of the Provisional Government. . . . . (ii.) Where an officer is transferred to the Provisional Government under this Order, he shall hold office by a tenure corresponding to his previous tenure, and if he is discharged by the Provisional Government, or if he retires in consequence of the change of Government effected by this Order, he shall be entitled to receive compensation from the Provisional Government and the terms of such compensation shall not be less favourable to him than such as are accorded in the like circumstances by the Government of Ireland Act, 1920." By Act No. I of 1922—the statute by which Dail Eireann enacted a Constitution for the Irish Free State—it was enacted that the articles of Agreement for a Treaty should have the force of law; and arts. 77 and 78 of the Constitution provided as follows: "77. Every existing officer of the

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Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure. 78. Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty." The effect of these enactments, and particularly of art. 78 of the Constitution, was to give to every existing officer who was transferred to the Provisional Government, and afterwards to the Free State, a right by Irish law to the benefit of art. 10 of the Agreement for a Treaty with a corresponding title to enforce that right in the Courts of the Free State.

But it was argued on behalf of the respondent that, even assuming that the statutes conferred a right, they gave the appellants no more than a right to put forward their claim to the Minister of Finance (to whom the functions of the British Treasury in respect of superannuation have been transferred) and to receive such compensation as he might award to them. In support of this view it was pointed out that at most the effect of art. 10 of the Agreement for the Treaty and art. 78 of the Constitution was to give to existing civil servants transferred to the Free State the rights accorded by the eighth schedule to the Government of Ireland Act, 1920; that under that schedule a civil servant retiring under the statutory conditions would only have been entitled to receive such compensation as the Civil Service Committee set up by that Act might award to him in accordance with the rules contained in the schedule; and that by s. 56, sub-s. 6, of the Act the determination of the Civil Service Committee of any claim or question which was to be determined by them under the Act was to be final and conclusive. In consequence of the establishment of the Free State the Civil Service Committee has, so far as Southern Ireland is concerned, never been set up; and it was argued that, this

being so, the right to make an award under sch. 8 of the Act of 1920 has reverted to the Minister of Finance as the successor to the British Treasury.

Their Lordships do not agree with this reasoning. It is true that the Civil Service Committee for all Ireland has lapsed, and that by s. 7 of the Irish Free State (Consequential Provisions) Act, 1922, such a Committee has been set up for Northern Ireland only; but the effect is not to transfer the functions of that Committee as regards Southern Ireland to the Minister of Finance. The right of an existing officer retiring under the statutory conditions to receive compensation in accordance with the rules contained in sch. 8 of the Act of 1920 remains, and is converted by art. 78 of the Constitution into a legal right; and, the machinery provided by the statute for ascertaining the amount of the compensation having disappeared, the duty of ascertaining it falls, in case of need, upon the Courts.

In this connection it is desirable to mention that, with a view to obtaining assistance in the duties falling upon him in this connection, the Minister of Finance has set up a Compensation Committee, whose duty it is to advise him as to the compensation to be awarded to retiring civil servants. This Committee consists of a judge of the Supreme Court, who is the chairman, two members appointed by the Minister and two appointed by the staff of civil servants. The constitution of the Committee is eminently fair, and there can be no doubt that its advice is of value; but it is an advisory Committee only with no statutory powers, and it was not and could not be contended on behalf of the respondent that its conclusions have a binding effect.

Upon the first point, therefore, their Lordships are of opinion that the appellants have a legal right which may be asserted in the Courts of the Irish Free State; and they see no objection to the form of the action, which is brought against the Attorney-General for a declaration of rights and is in accordance with the well known decisions in *Dyson* v. *Attorney-General* (1), and other cases.

(1) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

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Before dealing with the questions of amount it is desirable to state in a little more detail the position of the two appellants, the nature of the compensation awarded to them respectively, and the questions upon which disagreement has arisen.

Each of the appellants had many years of service to his credit, and each of them was entitled at the date of his retirement to a fixed salary and also to a supplemental salary (or bonus) varying with the cost-of-living figure; and in each case the notice of retirement, which was given in accordance with the statutory conditions specified in the eighth schedule to the Act of 1920, took effect after the passing of the Irish Free State Constitution Act. But there was this difference between the appellants—namely, that whereas the second appellant, Mr. Cochrane, had elected to adopt the provisions of the Superannuation Act, 1909, the first appellant, Mr. Wigg, had preferred to remain subject to the provisions of the Act of 1859. Accordingly, while the first appellant was entitled, in accordance with the Act of 1859, to a superannuation allowance equal to one-sixtieth of his annual salary and emoluments for every completed year of service (subject to the notional increases of his salary and years of service prescribed by part I. of the Rules contained in the eighth schedule to the Act of 1920), the right of the second appellant was to a superannuation allowance equal to one-eightieth of his annual salary and emoluments for every completed year of service (subject to the notional increases above mentioned), together with an additional allowance of a lump sum equal to one-thirtieth of his annual salary and emoluments for every completed year of service, but not exceeding one and a half times the amount of such salary and emoluments.

In calculating the pensions to be awarded to the appellants the Compensation Committee, whose recommendations were adopted by the Minister of Finance, proceeded generally upon the above lines. They made the proper notional increases in the salary (both fixed and supplemental) and in the years of service of each appellant, and awarded to

each of them a fixed pension representing the proper proportion of his fixed salary and a supplemental pension representing the proper proportion of his supplemental salary (or bonus) as so increased; but in each case they made it a condition of the award (1.) that the supplemental pension should be subject to reassessment quarterly with reference to the official cost-of-living figures from time to time declared, and (2.) that at no time should the supplemental pension exceed its prescribed amount at the date of the retirement, which was referred to as the "overriding maximum." Further (3.) in calculating the lump sum allowance to be paid to the appellant Cochrane in respect of his supplemental salary or bonus, they calculated that allowance upon 75 per cent. only and not upon the whole of the bonus to which he was entitled at the date of retirement. It is with regard to these conditions numbered (1.), (2.) and (3.) that the awards were questioned on this appeal.

In imposing the disputed conditions, the advisory Committee followed the principles laid down in a minute of the British Treasury dated March 20, 1922, which was adopted by the Minister of Finance on May 11, 1922; and it is necessary to consider whether the minute is binding on the appellants. In their Lordships' opinion it is not so binding. The minute was the outcome of a long discussion between the Treasury and the British civil servants as to the pensionable character of the bonus, and it is no doubt operative as to officers remaining in the service of the Crown in Great Britain; for, as to the pensions to be awarded to those officers, the Treasury has a wide discretion. But the minute cannot affect the rights of officers who at its date had been transferred to the Government of the Free State; nor could the Minister of Finance, who (as their Lordships have held) has no discretion as to the compensation to be allowed to officers in the position of the appellants, make the minute binding upon them by adoption. Their rights must depend upon the construction of the statutes without reference to any minute; and the question to be

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determined is whether and to what extent the disputed conditions are in accordance with the statutes.

As to the condition numbered (1.) their Lordships are of opinion that upon a reasonable interpretation of the statutes dealing with superannuation allowances, the supplemental pension can be made to vary (like the bonus on which it is calculated) with the cost-of-living figure. If a transferred officer were entitled on retirement to have his pension calculated upon his current bonus, without reference to any future variation, the effect might be that he would get more by way of pension than he could have claimed if he had remained in the British service, and their Lordships do not think that this was the intention of the Acts. The pension may be made to vary as the salary would have varied.

But on the same reasoning their Lordships do not think that the condition numbered (2.) can be sustained. If the pension is made to fall with the cost-of-living figure, it should also be capable of rising with that figure; and if the amount of the officer's salary at the date of his retirement is not conclusive for the purpose of preventing the application of the sliding scale under condition (1.), neither should it be treated as an overriding maximum as prescribed by condition (2.).

The condition numbered (3.) raises a difficult question. The additional allowance payable under s. 1 of the Superannuation Act, 1909, to an officer who comes within the provisions of that Act, is to be "a lump sum equal to one-thirtieth of the annual salary and emoluments of his office, multiplied by the number of completed years he has served." There is an obvious difficulty in applying this formula to a salary which may vary up or down from year to year, and no doubt it was on this ground that the Treasury, in the minute above referred to, directed that this allowance should be calculated on 75 per cent. only of the current amount of the bonus. But in their Lordships' opinion there is no warrant in the statute for this rough and ready way of dealing with the matter. The lump sum allowance, as Meredith J. pointed out, is not intended as a commutation

payment for the purpose of investment, but as an allowance for meeting the increased temporary expenditure connected with the officer's retirement; and accordingly it is reasonable that it should be regarded as an accession to the first year's pension and be calculated on the same basis as that pension. Upon the whole their Lordships are of opinion that this condition cannot be sustained.

The result is that their Lordships find themselves in agreement on every point with the judgment of the learned trial judge, and they are of opinion that the order of the Supreme Court should be set aside and the judgment of Meredith J. restored. The respondent shall pay the costs of the appeal to the Supreme Court; but, as on the appeal to this Board the appellants contended unsuccessfully against the application of a sliding scale to their pensions, there should be no costs of that appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Herbert Z. Deane & Co.*
Solicitors for respondents: *Coward, Chance & Co.*

[PRIVY COUNCIL.]

J. C.* 1927 May 24.

A. H. BULL AND COMPANY . . . . APPELLANTS;

AND

WEST AFRICAN SHIPPING AGENCY AND LIGHTERAGE COMPANY . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Negligence—Bailment—Hire of Lighter—Negligence of Owners' Lightermen——Loss of Lighter—Lightermen under Control of Hirers—Liability of Hirers.

The appellants let on hire to the respondents a lighter manned by two native lightermen. The lighter was moored to the respondents' ship in Lagos harbour, and was used by them during the day in loading the ship. During the night the lightermen negligently left the lighter. The lighter got adrift, and owing to the absence of the lightermen, it was carried out to sea, ran ashore, and broke up:—

Held, that the lightermen being under the orders and control of the respondents during the night as well as during the actual loading, the respondents were responsible for their negligence and were liable to the appellants in damages.

Donovan v. *Laing, Wharton, & Down Construction Syndicate* [1893] 1 Q. B. 629 approved and applied.

Bain v. *Central Vermont Ry. Co.* [1921] 2 A. C. 412 followed.

Judgment of the Supreme Court of Nigeria reversed.

APPEAL (No. 95 of 1926) from a judgment of the Supreme Court of Nigeria (March 8, 1926) reversing the judgment of Tew J. at the trial.

The appellants, as agents for the United States Shipping Board Emergency Fleet Corporation, brought an action against the respondents in the Supreme Court claiming damages for the loss of a lighter which they had let on hire to the respondents manned by two native lighter-boys. They alleged by their statement of claim that the lighter, whilst under the respondents' control and lying alongside the steamship *Rijnland* in the Pool, Lagos, broke adrift owing to the respondents' negligence and was carried out to sea. The respondents by their defence denied that the lighter was under their control, and alleged that it had broken

* *Present:* VISCOUNT HALDANE, LORD SHAW, and LORD WARRINGTON OF CLYFFE.

adrift and been carried out to sea owing to the negligence of the appellants and their servants. By particulars of the negligence they alleged: (1.) that the lighter-boys were not in the lighter when she broke adrift; (2.) that the appellants were negligent in making fast the lighter to the ship; and (3.) that the ropes supplied by the appellants were not suitable for making fast the lighter to the ship.

The facts appear from the judgment of the Judicial Committee.

The trial judge in the course of his judgment found: (1.) that it was the duty of the lighter-boys, or one of them, to remain on the lighter during the night; (2.) that the lighter went adrift owing to the parting of a four-inch rope supplied by the appellants; (3.) that the rope was sufficient for the purpose and parted owing to a latent defect; (4.) that the lighter was lost owing to the negligence of the lighter-boys in being absent when the lighter broke adrift. He held that the lighter-boys at the time were the servants of the respondents, who consequently were liable for their negligence. Judgment was given for the plaintiffs.

An appeal to the Full Court was allowed by Combe C.J. and Van der Meulen J., Maxwell J. dissenting. The majority of the Court were of opinion that the trial judge had not found that it was negligent on the part of the defendants not to see that the lighter-boys, or one of them, remained on the lighter during the night; and that in the absence of that finding the plaintiffs were not liable.

1927. May 3, 5. *Langton K.C.* and *Pritt K.C.* for the appellants.

Neilson K.C. and *G. S. Pilcher* for the respondents.

[In addition to cases referred to in the judgment reference was made to *Société Maritime Française* v. *Shanghai Dock and Engineering Co.* (1)]

May 24. The judgment of their Lordships was delivered by

Lord Shaw of Dunfermline. This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria

(1) (1921) 125 L. T. 134.

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reversing, on March 8, 1926, and by a majority, the judgment of the Divisional Court, dated December 21, 1925. The Divisional Court had given judgment in favour of the appellants for 2376*l.* 5*s.* 2*d.* with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned.

The facts are very simple. Both parties are shipowners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June, 1925, the appellants let on hire to the respondents a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighter-boys, that is coloured labourers. The lighter was transferred on June 2, and the mischance sued for occurred upon the night of June 5. The coloured labourers were, from the moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship *Rijnland*. She was lying in the harbour of Lagos, and on the evening of June 5 a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the *Rijnland :* and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do what was required should the ropes be unable to stand the strain of the current. The simplest of all things would have been to catch a rope if thrown from the *Rijnland*, and the boatswain of the *Rijnland* explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped ; and they had forsaken the duties which they were bound to perform, both of taking charge of the barge, and of giving obedience to the orders of the officers of the *Rijnland*. The consequence was that the barge, having parted her moorings,

drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be salved.

These are substantially the relevant facts as found in the judgment pronounced by the learned judge, Tew J. Their Lordships think it right to say in a word, with regard to that judgment, that not only the learned judge in their opinion came to a right conclusion upon the facts, but his review, as a clear and accurate review of this part of the law and the decided cases thereon, meets with the Board's entire approval.

The Full Court (Maxwell J. dissenting) reversed this judgment—in particular upon the ground that there was no evidence that the lighter-boys were at any time necessary except when the craft was under weigh or in active use. One of the plaintiffs' witnesses had said: "I do not think it advisable as a precaution for one lighter-boy to remain on board all night. I don't think it could do any good." Upon this the learned Chief Justice observes: "I can find nowhere in the other evidence before the Court an expression of an opinion to the contrary of that held and expressed by the plaintiffs' representative."

Their Lordships have some difficulty in understanding this opinion, which seems to be quite out of accord, not only with the defendants' evidence but with the admissions made in the Court below.

Fontein, the defendants' agent, swore: "When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night." Brunt, the master of the *Rijnland*, says: "There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved"; and on the special point in issue Van Duyn, the boatswain of the *Rijnland*, says plainly: "In my opinion all lighter-boys ought stay on lighter."

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think the proved facts are correctly viewed by Tew J. and not by the Full Court.

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The Full Court, however, went further, and held on the question: "Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . . . keep a boy on board the lighter at night?" in the negative. In the opinion of their Lordships this was wrong. The appellants had entrusted for the period of the hiring the control of their chattel to the respondents. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on; and the suggestion that the lighter-boys passed into the control of the defendants during that active lighterage, but out of the control and back into the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law of the position is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost.

Upon the law of the case, it may be said, the facts being as just put, that the cleavage of opinion in *Laugher* v. *Pointer* (1), in which the judges were equally divided, has been long disposed of in *Quarman* v. *Burnett*. (2) Baron Parke thus dealt with it: "We are therefore compelled to decide upon the question left unsettled by the case of *Laugher* v. *Pointer*. (1) . . . . We have considered [the judgments in that case] fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale."

Quarman's case was stronger on the facts than that of *Laugher*. In *Laugher's* case the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case the owners

(1) (1826) 5 B. & C. 547. (2) (1840) 6 M. & W. 499, 509.

of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing, so much so that the owner of the carriage even provided the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan* v. *Laing, Wharton & Down Construction Syndicate* (1) for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case the defendants contracted to lend to a firm, who were engaged in loading a ship, a crane with a man in charge of it; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants, yet as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. Bowen L.J. put the matter thus (2): "The law on the matter now before us seems to me to be perfectly clear. . . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. . . . . It is clear here that the defendants placed their man at the

(1) [1893] 1 Q. B. 629. (2) [1893] 1 Q. B. 633, 634.

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disposal of Jones & Co., and did not have any control over the work he was to do."

The same law had practically been laid down in *Rourke* v. *White Moss Colliery Co.* (1) In the opinion of their Lordships the law stands exactly where Cockburn C.J. there put it—namely, as follows: "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

These cases have a habit of repeating themselves, and there are others in the books to the same effect; but their Lordships think it only necessary to refer to *Bain* v. *Central Vermont Ry. Co.* (2), decided by this Board, in which Lord Dunedin approves of the language of Cross J. in the Court of King's Bench of Quebec, who had adopted the suitable phraseology of "patron momentané" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men being away from the barge was not negligence. They had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed: the judgment of the Full Court set aside with costs; and the judgment of the Divisional Court restored. The respondents will pay the costs of the appeal.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Botterell & Roche.*

(1) (1877) 2 C. P. D. 205, 209. (2) [1921] 2 A. C. 412.

[PRIVY COUNCIL.]

KOJO PON . . . . . APPELLANT;

AND

ATTA FUA . . . . . RESPONDENT.

J. C.*
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ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

Gold Coast Colony—Procedure—Appeal in Colony—Bond to secure Costs—Bond executed by Agent—Authority of Agent—Dismissal of Appeal—Failure to do Justice.

The appellant obtained leave to appeal in the Gold Coast Colony conditionally upon entering into a bond. On July 10, 1922, the native agent of the appellant who, in accordance with the rules of Court, had conducted the litigation, executed a bond on his behalf in the presence of the chief registrar of the Court, who accepted it without objection. Upon the appeal coming on for hearing in April, 1924, the appellate Court dismissed it upon a preliminary objection that the authority of the agent to execute the bond should have been strictly proved. Under the rules of the Court there was power to make any order which was considered necessary for doing justice:—

Held, that there had been a failure to do justice between the parties, and that the case should be remitted to be heard, the appellate Court giving an opportunity to prove the authority, if that was deemed necessary in the circumstances.

Judgment of the Supreme Court reversed.

APPEAL (No. 48 of 1925) from a judgment of the Supreme Court of the Gold Coast Colony (April 10, 1924) dismissing, upon a preliminary objection, an appeal from a judgment of Smyly C.J.

The sole question upon the appeal was whether the Supreme Court had rightly dismissed an appeal, upon a preliminary objection at the hearing, on the ground that it was not proved that the person who executed a bond, the giving of which was a condition to the appeal, had authority to do so on behalf of the appellant.

The facts appear from the judgment of the Judicial Committee.

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The Full Court in delivering its judgment referred to previous cases in which it had held that a defect in the bond was fatal to an appeal.

1927. May 5. *Montgomery K.C.* and *J. A. Johnston* for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case their Lordships have the difficulty, which imposes the necessity of great caution, that the appeal comes here ex parte. Consequently they felt it right to look very minutely at what has been said and at the particular rules that concern it; nevertheless, on those rules and on what has transpired, they think that there is sufficient before them to enable them to deal with the case at once.

The appeal is brought from a judgment of the Supreme Court of the Gold Coast Colony, which had to entertain an appeal from the judgment of Sir Philip Crampton Smyly C.J. He had non-suited the plaintiff in an action on the ground of want of jurisdiction, and the appeal really involved the whole merits. It raised an elaborate question as to the title to native lands. When the present appellant proposed to appeal to the Supreme Court of the Gold Coast he had, of course, to conform with what the rules of Court required, and he applied for and obtained from the Divisional Court conditional leave to appeal against the judgment of the Chief Justice, subject to certain conditions being fulfilled within one month of the date of his application. Among these conditions was this, that 100*l.* was to be paid into Court to await any order as to costs that might be awarded to the respondent by the appellate Court in the case of his success, or a bond was to be entered into with two sureties to be justified in the sum of 50*l.* each. It was on July 7, 1922, that that order was made, and the appellant proceeded to enter into the bond prescribed by the order. There is no doubt, their Lordships think, that it was quite in accordance with the rules to prescribe this.

The rules of Court are enlightened and comprehensive and they give practically all the powers that the Courts here have. Under Order v. of the first schedule to the rules there is a direction that "the Court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not." Then there is a series of further rules contained in Order XI., which are, again, very comprehensive. "When by the rules of the schedules of this Ordinance any act may be done by any party in a suit, such act may be done either by the party in person, or by his solicitor or agent, if it can be legally done by an agent."

Under Order LIII. of Sch. 2, the appellant has to give security for costs of an appeal; but that obligation is imposed only in very general terms. There are specific directions as to the powers of the appellate Court to require security for costs, and then generally, that they may make any order necessary for determining the real question in controversy in the appeal, and that there is full jurisdiction over the whole suit as if the same had been instituted and prosecuted in the appellate Court as a Court of first instance, with power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require.

That being the law and the plaintiff having been ordered to give security for the costs of his appeal, the plaintiff proceeded to enter into the bond which he was directed to execute. He was represented through the proceedings by Kwabena Asiama, and Kwabena Asiama, who conducted the proceedings for him, executed the bond. The bond was dated July 10, 1922; it provided security for the costs of the appeal to the respondent if they were given to the respondent. It was executed by Kwabena and two sureties in the presence of the chief registrar to the Court, and it purported to be executed by Kwabena as the representative of Kojo Pon. That was as long ago as July 10, 1922, and, whether or not the parties know about it, the Court must

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be taken to have known that their registrar had accepted the security.

The case came on by degrees, and finally it was reached for hearing by the appellate Court in April, 1924, and it was heard and judgment was delivered on April 10, 1924, by Michelin, Hall and Gardiner Smith JJ. Those learned judges accepted a point which their Lordships think they ought not to have accepted. It was argued by counsel for the respondent, by way of preliminary objection, that the conditions of appeal had not been fulfilled, inasmuch as the bond for the costs of the appeal was not signed by the appellant, but by Kwabena, purporting to act as his representative. It was argued that the Court having granted only conditional leave to appeal, it was incumbent on the plaintiff himself to execute the bond, and Kwabena could not execute the bond, unless he had first obtained an order from the Court authorizing him to do so. The learned judges held that, as regards the bond to be entered into with two sureties to be justified in the sum of 50*l.* each, no proof had been given of the authority of Kwabena to execute on behalf of the appellant; the authority of Kwabena ought to be strictly proved; and the bond must, therefore, be taken to have been invalid and the defect was fatal to the appeal.

Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done. That may not always be possible. There may be conditions in the local law or in the rules which preclude the possibility of getting round technical obstacles and doing complete justice. But they think that in the case of the rules of procedure in the Gold Coast Colony there are no such obstacles. The Court was invested with the widest powers, and it might have adjourned the hearing of the appeal until a proper bond was executed, or it might have said that an affidavit was sufficient; and that was the more incumbent on the Court because its own registrar had accepted the bond executed by Kwabena on behalf of the appellant.

Under these conditions their Lordships think that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and they are of opinion that the case must be remitted to the Court below to deal with it again, hear it, and, if necessary, get some formal proof of Kwabena's authority; but, as at present advised, their Lordships do not think that necessary, inasmuch as Kwabena's authority was accepted by the registrar, and inasmuch as he had acted right through, and nobody till the other day ever challenged his authority. However that may be dealt with by the Court below, if they think it necessary to deal with it at all. For the present it is enough to say that the case must go back and be heard out.

Then comes the question of what to do with the costs of this appeal. It has only been ex parte before the Board, and it may be that the appeal will not be fruitful; it may so turn out.

Their Lordships therefore think that the right course will be that the appellant's costs should be included in any costs he may recover in the Court below. If he recovers no costs in the Court below, he will not get any costs of this appeal, but he will not have to pay any costs. On the other hand, if he succeeds, he will get these costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

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CAPTAIN J. A. CATES TUG AND WHARFAGE COMPANY, LIMITED } APPELLANTS;

AND

FRANKLIN INSURANCE COMPANY . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Insurance (Marine)—Sinking—Absence of actual total Loss—Abandonment—Underwriters inviting Offer for Ship—Probable Cost of Repair—Finding without Error of Principle—Finality of Finding—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 61, 62.

The respondents insured the appellants' tug boat by a policy of marine insurance which provided that on a claim for a constructive total loss the insured value was to be taken as the repaired value and that nothing was to be taken into account for the damaged value, also that all claims were to be subject to English law and usage. The tug was sunk by collision, and the appellants at once gave notice of abandonment. Salvors employed by the respondents raised the tug in a few days, and the abandonment was not accepted. The salvors, without the knowledge of the appellants, made an offer to the respondents for the tug, and the respondents requested them to put it into writing, which they did. In an action in British Columbia the trial judge held that the respondents were precluded from denying that they had accepted the abandonment. The Court of Appeal reversed the decision, and, considering the evidence as to the probable cost of repair, held that there had been only a partial loss to an amount less than that paid into Court.

Held (1.), that the sinking was not an actual total loss.

Observations of Lord Halsbury L.C. in *Sailing Ship "Blairmore" Co.* v. *Macredie* [1898] A. C. 593, 597, 598 explained.

(2.) That the respondents were not precluded from denying that they had accepted the abandonment.

(3.) That there had been no constructive total loss within the Marine Insurance Act, s. 60, sub-s. 2 (i), since even at the date of the abandonment it was not unlikely that the tug could be recovered; it was therefore unnecessary to consider whether the old rule that the crucial moment was the commencement of the action had been modified by ss. 61 and 62.

(4.) That the Court of Appeal was not bound to accept the highest estimate of the cost of repairs given by the respondents' witnesses;

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and that the Court's finding as to the sum necessary, being justified by the evidence and not being based upon any error of principle, could not be questioned.

Judgment of the Court of Appeal of British Columbia affirmed.

APPEAL (No. 50 of 1927) from a judgment of the Court of Appeal of British Columbia (October 5, 1926) reversing a judgment of the Supreme Court.

The appellants brought an action in the Supreme Court against the respondents upon two policies of marine insurance on their motor tug boat *Radius*. The vessel had been sunk in collision, but subsequently raised.

The trial judge (Murphy J.) held that there had been a constructive total loss, the defendants being precluded from denying that they had accepted an abandonment. The Court of Appeal set aside the judgment, and held on the evidence with regard to the probable cost of repairs that there had been no constructive loss, and that the partial loss was to an amount less than that tendered and paid into Court.

The facts appear from the judgment of the Judicial Committee.

1927. May 20, 23. *J. A. MacInnes* for the appellants. *W. M. Griffin* for the respondents.

June 20. The judgment of their Lordships was delivered by

VISCOUNT SUMNER. The appellants were the owners of the motor tug boat *Radius* when she was sunk in collision just outside the entrance to Burrard Inlet, the harbour for the city of Vancouver, on August 26, 1925, and went down in about fifteen fathoms.

She was covered at the time by two policies of insurance, issued by the respondents, one for $24,000, so valued, on hull ($12,000), and machinery ($12,000), against all risks, and the other on disbursements for $6000 on the like value, against total or constructive total loss only, with a limited part of any general average and salvage. Both policies contained the following clauses: "In ascertaining whether

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the vessel is a constructive total loss, the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. . . . . Warranted to be subject to English law and usage as to liability for and settlement of any and all claims," and also sue and labour clauses in the usual terms. The disbursements policy further contained the words " to follow Hull underwriters in the event of total or constructive or compromised total loss."

The plaintiff company sent to the underwriters' agents notice of the accident on the day of the collision and notice of abandonment on the day after, which on September 3 the respondents refused in writing to accept " at that stage." Prompt arrangements were also made by the agents to ascertain the exact position of the sunken tug. This was done without difficulty, oil being observed on the surface in the neighbourhood of the place of collision. The spot was buoyed on August 27, and on August 28 a diver was sent down, who reported the tug to be resting on the bottom there, right side up, and though holed in one place amidships otherwise apparently undamaged. Thereupon a contract was made with salvors on August 29 to raise her for $6500, no cure, no pay, and by September 2 she had been raised and towed inshore. Next day she was beached and the hole was temporarily patched. Examinations and surveys followed, those made for the underwriters being detailed surveys by skilled surveyors, those on the other side amounting to little more than a general look round without detailed estimates.

The result was that the appellants were advised by one witness (Moscrop), thus : " I didn't think she would be worth fixing up. I thought it would be cheaper to build a new boat and put the money in that," and by another (Lucas) that the cost of repairing the engine would be probably four or five thousand dollars, which would make it worth about five thousand.

On the other hand, detailed estimates based on the surveys were furnished to the underwriters and tenders to do the work were made by responsible ship repairers at Vancouver

for amounts ranging from $10,348 to $14,730. There were further admitted items for expenses of various kinds, amounting to $3042. The appellants' witnesses did not address themselves to the point that the expense of repair had to be compared with an insured value of $24,000, or realize that the question could not be solved by asking merely whether it would pay the owners best to abandon at the outset and buy a new tug, or to undertake the work of effecting the necessary repairs. On the underwriters' figures, which were the only figures presented "in accordance with English usage in the settlement of claims," there could be no constructive total loss, unless the highest estimate and no other was adopted, and even then the margin would only be $272.10.

While the surveys and estimates were being made, the salvors happened to ask the underwriters' representative whether, if the wreck were to be sold, they could be given a chance to purchase. A non-committal reply was given at the moment, but a little later an offer of $12,500 was made by word of mouth, to include the $6500 salvage. In return a request was made that the offer should be put into writing, which was done, but after an interval of some three weeks this offer was withdrawn. The appellants knew nothing of this incident until after litigation had begun, so that, whatever else may be made of it, estoppel, on the basis of a representation available to the appellants and a consequent change of position on their part, is out of the question.

It was on this incident that the judgment turned, which the trial judge gave in favour of the appellants for a total loss. He held that, by reason of these communications between the underwriters and a third party, there had been a binding acceptance of the abandonment, which had been tendered by the assured, in spite of their formal refusal of it. He held that they had done an act which could only be justified under a right derived from abandonment, "for," said he, "does not the solicitation and receipt of a bona fide bid to purchase necessarily imply power to make title should the bid be accepted?" Their Lordships can only

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say, as the Court of Appeal said, that it does not. The underwriters in this tentative negotiation did not act as owners of the tug or exercise dominion over it, and they did not purport to sell and convey or to make a title for that purpose. An agreement to sell, had it been concluded, would only have been an executory contract, which they would be able to perform if and when they chose to accept the abandonment, but in itself it could not be an act of ownership. As a matter of fact, this everyday proceeding was nothing more than a precaution, equally available in connection with proving a defence in case they should resist the claim or with preparing to make the best of the loss if they should give up the contest and elect to pay. The analogy of goods sold by sample, or delivered on approbation to a person, who thereupon sells them over to a third party and so determines his right to elect whether he will take the goods or return them, is one which, though it was urged on their Lordships by counsel at the Bar, it is impossible to adopt.

As the trial judge had not tried the issues of actual, constructive or partial loss, or of the amounts payable accordingly, the Court of Appeal proceeded to determine them on the shorthand notes of a very copious examination and cross-examination of the witnesses on both sides. To this course no objection was taken. The plaintiffs did not seek to have the case sent back to the trial judge to complete the hearing; the defendants were content to take the decision of the Court of Appeal. In the result the Court, having the fullest materials before them on questions which were essentially questions of figures and of fact and depended little on the credibility of the respective witnesses, came in effect to the conclusion that the loss was not an actual total loss, for the tug was clearly capable of being salved and repaired, as any prudent uninsured owner would have seen; that, on a comparison of the aggregate cost of salvage, repairs and incidental expenses with the insured value, there was such a margin as made the loss partial only, and that as to the amount of that partial loss the $11,500, tendered before

action and paid into Court, taken together with the amount of the salvage bill, which the underwriters had discharged, sufficed to satisfy the assured's claim.

The contentions of the appellants before their Lordships were: (1.) that there was a constructive total loss, because the assured had been "deprived of the possession of his ship . . . . by a peril insured against," and because it was unlikely that he could recover (Marine Insurance Act, s. 60, sub-s. 2), unlikely, that is, at the time when he gave his notice of abandonment; and (2.) that when the tug went to the bottom there was an actual total loss, in accordance with Lord Halsbury's well known observation in *Sailing Ship "Blairmore" Co.* v. *Macredie.* (1) Lord Halsbury said: "In this case a controversy has been raised which I had thought had long since been laid to rest. . . . . I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again, and I think, in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk."

The first contention is disposed of at once as soon as it is appreciated how probable the recovery of the tug was, even when the notice of abandonment was given. The tug had sunk near to a great city and within the neighbourhood of its harbour. Skilled persons and modern appliances were available to raise her. The weather caused no difficulties: the exact spot where she sunk was easily ascertained. She was neither very large nor very heavy. The diver at once found that she rested conveniently on a gravel bed and was neither broken up nor in danger of going to pieces. Experience at Vancouver showed, as experience has shown in many other similar places, that it was quite a feasible operation to raise such a vessel. Even the depth in which she lay, and the fear, in any case rather a remote one, that tides and currents might have shifted her position into much deeper water, was at once found to have nothing in it. The appellants

(1) [1898] A. C. 593, 597, 598.

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accordingly failed to bring themselves within s. 60, sub-s. 2, and it is unnecessary to consider the question which has been raised (see Arnould on Marine Insurance, 11th ed., s. 1097), whether or not the old rule, which makes the commencement of the action the crucial moment in considering whether a constructive total loss has occurred, has been modified by ss. 61 and 62.

As to the second argument, Lord Halsbury's observation has unfortunately been so applied in this case as in itself to reawaken controversies, which in his time were well settled. If Lord Halsbury meant to decide that, when the *Blairmore* sank, she was, then and there, totally lost, the whole discussion, on which the rest of his judgment and the judgment of his colleagues turn, was otiose, nor was any notice of abandonment required at all. So far, however, from the action being, as in this view it was, for an actual total loss, it had from the first been brought for a constructive total loss (see the report in the Court of Session (1)), and the issue was whether, by raising her at their own expense, the underwriters could insist on eliminating this item of salvage from the comparison between her repaired value and the costs of putting her in a position to be repaired and of then repairing her, and could on this footing successfully aver that there was only a partial loss—namely, the cost of the repairs themselves : see per Lord Watson (2) and Lord Herschell. (3) What Lord Halsbury said was not necessary to the decision nor was it part of the reasoning on which the decision of the House was based, and it expresses only his opinion at that time on the particular fact which the case presented—namely, that his ship had been sunk in a squall in sixty fathoms (4), while laid up in ballast in San Francisco Bay in the year 1896. The physical possibility of raising a sunken ship depends not only on the place where she lies, her size and injuries, and the available facilities for salvage work, but also on the existing state of the salvors' art, which, since 1896, has made very considerable advances. Lord Halsbury's

(1) (1897) 24 R. 893.
(2) [1898] A. C. 593, 601, 602.
(3) [1898] A. C. 610.
(4) 24 R. 893, 898.

remark must not be taken as meaning that any ship is an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present to salvors a problem of some difficulty. It does not therefore avail to relieve the appellants from the necessity of proving a constructive total loss in this action.

The rest of the case raises questions of figures only, as to which the Court of Appeal had materials fully sufficient to justify their findings without being open to review except upon questions of principle. It was argued that such a question was to be found in the estimates of the cost of repairs presented by the underwriters, and that, as against them, the assured was entitled to pin them down to their highest estimate, since all were put forward as worthy of credit and none could therefore be discredited by the underwriters themselves. There is one obvious fallacy in this ingenious argument. This evidence was not given in respect of a fact, which was within the cognizance of those who presented it. The subject was a matter of opinion and was strictly one of estimate, not of knowledge. The witnesses were qualified technically, and their business was, by their special skill, to assist the Court in solving the question in issue—namely, the true cost of repairs. On their evidence the Court had to exercise a judicial selection, and this was properly done, nor can their Lordships now review it. A figure was chosen, which failed to establish either a constructive total loss or a partial loss to an amount in excess of the aggregate of the sum paid into Court and of the salvage service, of which the plaintiffs had the gratuitous benefit, and with this conclusion their Lordships do not interfere.

They will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitors for appellants: *Johnson, Jeeks & Colclough.*
Solicitors for respondents: *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.* 1927 June 20.

MUNICIPAL COUNCIL OF SYDNEY . . APPELLANTS;

AND

M. A. TROY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Sydney Corporation—Resumption of Land—Compensation—Rate of Interest—Sydney Corporation (Amendment) Act (No. 7 of 1924), s. 17.

Under s. 17 of the Sydney Corporation (Amendment) Act, 1924, the rate of interest upon the agreed amount of compensation on a resumption of land under the Sydney Corporation Act, 1902, and amending Acts prior to 1924, is increased from 4 per cent. to 6 per cent. per annum from the date of the commencement of the Act of 1924—namely, September 17, 1924.

Judgment of the Supreme Court [1926] S. R. (N. S. W.) 507 affirmed.

APPEAL (No. 119 of 1926) from an order of the Supreme Court of New South Wales (August 27, 1926) upon a special case stated by consent.

The Supreme Court (Street C.J., Gordon and Ferguson JJ.) held that as from the passing of the Sydney Corporation Amendment Act, 1924, the respondent was entitled to interest at 6 per cent. in lieu of 4 per cent. per annum upon money due to her as compensation for land required prior to the passing of that Act. The case is reported at [1926] S. R. (N. S. W.) 507.

The facts appear from the judgment of the Judicial Committee.

1927. May 22. *W. A. Greene K.C.* and *Nesbitt* for the appellants.

Hon. Geoffrey Lawrence K.C. and *Barton* for the respondent.

On behalf of the appellants reference was made to *Gardner* v. *Lucas* (1); *Moon* v. *Durden* (2); and *West* v. *Gwynne*. (3)

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD SHAW, LORD MERRIVALE, and LORD WARRINGTON OF CLYFFE.

(1) (1878) 3 App. Cas. 582. (2) (1848) 2 Ex. 22.
(3) [1911] 2 Ch. 1.

June 20. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of New South Wales, delivered in favour of the respondent who was plaintiff in an action. The appellants were defendants and the question decided was raised by a special case.

Before 1924 the respondent was owner in fee simple of a piece of land in the City of Sydney. On June 6, 1924, the appellants, in accordance with the provisions of the Sydney Corporation Act, 1902, and the amending Acts, caused, for improvement purposes, a notice for the acquisition of the piece of land to be published in the Gazette and other proper newspapers, and complied in all respects with the provisions necessary for the acquisition. Thereupon, by virtue of the publication of the notice, the land, under the existing statutory provision, became vested in the appellants for an estate in fee simple, and the respondent became entitled to receive compensation. Within due time from the publication, the respondent served a notice of her claim to compensation. The appellants made a valuation, and the amount payable to the respondent was agreed at 60,828*l*. The only question that arises is as to the rate of interest properly payable under the circumstances upon the amount so ascertained as due. At one time, under the Public Works Act, 1900, providing for the acquisition of land for public works, the interest payable on the amount of compensation for land resumed thereunder was 6 per cent. The provisions of this Act were incorporated by reference in the Sydney Corporation Acts, the interest rate being lowered to 4 per cent. Subsequently the interest rate under the Public Works Act was similarly reduced. The provisions as to resumption were altered in other respects in 1905 by an Act of that date, under which, in lieu of service of notice, publication in the Gazette and certain newspapers was substituted for it, and the land was to vest on the publication of the notice and description. There was another amending Act of 1916 into the provisions of which it is not necessary to enter. But in 1924 the Sydney Corporation Act of that year enacted that the 1924 Act and

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the 1902 Act and the Acts amending it should be construed along with the 1924 Act as the principal Act.

The 1924 Act as thus defined also enabled the appellants to acquire land subject to certain reservations in favour of the owner and to effect realignments for the purposes of widening. On these provisions, in the opinion of their Lordships, nothing turns for the purpose of the present question. The only material provision is that contained in s. 17, which is in these terms: "Notwithstanding the provisions of any other Act the rate of interest payable upon compensation for land acquired by the Council by resumption or by the realignment method, or by any compulsory purchase, shall be six per centum per annum."

The Act of 1924 came into operation on September 17 in that year, and, as already stated, the acquisition (called resumption) had taken place under the existing statute on June 6.

The respondent claims that on the proper construction of s. 17 of the Act of 1924 interest at 4 per cent. was payable on the agreed amount of compensation as from June 6 in that year, the date of the publication of the notice and of consequent vesting in the corporation, up to September 17, and thereafter at 6 per cent., notwithstanding that the Act did not become operative until September 17, when it received the Royal Assent. The appellants contend, on the other hand, that the title to interest at 6 per cent. under s. 17 could not arise in regard to an acquisition before the Act became operative. One reason for this contention is that the Act of 1924 for the first time enabled the "realignment method" to be adopted, and that accordingly s. 17, which extends to interest accruing under that method, must be treated as limited to land acquired after the Royal Assent was given to the Act, inasmuch as the realignment method was established by the Act for the time. The realignment method is thus, according to the argument for the appellants, a key to the scope of this section. But they go further and contend that even as regards ordinary acquisition or resumption there is a similar indication of intention to be found

in the language of s. 17, in that the payment of interest at 6 per cent. is to be limited to cases of acquisition or resumption after the Act of 1924 had become operative. Resumption, they argue, by means of public notification, instead of by service of notice on the owner, was first authorized by the Act of 1905. The compensation was to be ascertained under the provisions of the Public Works Act, 1900, the scheme of which for this purpose is to be incorporated with the Act of 1905. Under the Public Works Act, 1900, by s. 119, sub-s. 2, if compensation is payable in respect of land taken by notification in the Gazette (the then mode) it is to bear interest as from the date of this notification. As the Act of 1924 is to be read with the Act of 1905 it is argued that the word "acquired" in s. 17 of the Act of 1924 should be read as meaning acquired after that Act came into operation.

The learned judges of the Supreme Court of New South Wales agreed in rejecting this contention, and held that the respondent was entitled to succeed. The main ground of their reasoning turned on the ambit and scope of s. 17.

"It cannot be contended," said the Chief Justice, "and it is not contended, that it is retrospective in its operation so as to affect the rate at which interest was payable before it came into operation, but the question is whether the direction that interest thereafter is to be at the rate of 6 per cent. per annum applies only to subsequent acquisition of land, or applies as well to prior acquisitions, the compensation for which was still unpaid when it came into force. The words used are perfectly general. What is spoken of is the rate of interest payable upon compensation for land acquired by the Council. No distinction is made between land acquired before the Act and that acquired after, and to give effect to the contention of the Municipal Council it would be necessary to substitute for the wide and general word 'acquired' some such words as 'to be acquired,' or 'hereafter acquired.' I can find nothing in the section to justify the imposition of any such limitation, and there is no rule or presumption which requires that the word should be so limited in its meaning."

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The learned Chief Justice goes on to say that it is plain that the purpose of the section was to bring up the rate of interest from one which was too low to 6 per cent., the lower rate being inadequate to the ruling rate of interest.

Their Lordships find themselves in full agreement with the conclusion thus expressed. In their opinion this conclusion is neither affected by the well known rule of construction against retrospective interpretation, nor by anything to be imported from the expressions used in the earlier statutes in the series which has to be read in conjunction. Sect. 17 must in their opinion be read as laying down a principle standing by itself, and to prevail, as the section declares, notwithstanding the provisions of any other Act. The new rate of interest relates to the amount of compensation for land acquired by any of the alternative methods. This provision is a substantive one which is not made to depend on any reference to corresponding provisions in the earlier statutes, and does not give rise to any question of retrospective operation.

On June 6, 1924, the entire title to the piece of land in question was acquired by and became vested in the appellants, who became then entitled to compensation. On September 17, 1924, the new standard rate of interest was declared to be applicable to the compensation for all land acquired. Their Lordships think that these words are unambiguous. They give a title to the higher rate of interest as from September 17, and apply subsequently to the passing of the Act which contains this fresh provision to compensation for land acquired prior thereto, notwithstanding that the Act was assented to later. Accordingly, between June 6 and September 17 the rate will remain 4 per cent., and after that is 6 per cent.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondent: *Hughes & Sons.*

[PRIVY COUNCIL.]

M. A. SASSOON AND SONS, LIMITED . APPELLANTS ;

AND

INTERNATIONAL BANKING CORPORATION . . . . . } RESPONDENTS.

J. C.*
1927
May 27.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Bill of Exchange—Bankers—Confirmed Credit—D/A Draft—Surrender of Shipping Documents—Payee's Right of Recourse against Drawer—Drawer's Loss of Rights under confirmed Credit—Printed Mercantile Contract—Deletion of Words.

The appellants, merchants at Calcutta, sold goods to merchants in London at a c.i.f. price, payment by drafts against a confirmed credit, to be opened by the buyers. On shipment of the goods the appellants drew on the buyer bills payable to the respondents, who negotiated them with notice that they were drawn against a confirmed credit opened by the buyers with the Eastern Bank. The appellants handed to the respondents with the bills the shipping documents, also a memorandum describing the bills as D/A (i.e., documents against acceptance) drafts. The respondents handed the documents to the buyers against their acceptances, which were dishonoured upon maturity. The respondents sued the appellants as drawers of the bills :—

Held, affirming the judgment of the High Court, that the respondents were entitled and bound to treat the description of the bills as D/A drafts as a direction to hand the documents to the drawees on their acceptance, and that the appellants had no defence, set-off or counter-claim in respect of the loss of the rights which they would have had under the confirmed credit if the documents had been handed to the Eastern Bank for presentation.

In re Agra and Masterman's Bank (1867) L. R. 2 Ch. 391 distinguished.

It is well settled that words deleted in a printed form of mercantile contract are to be treated as if they had not formed part of the printed contract; they cannot be used to construe added words.

APPEAL (No. 99 of 1926) from a decree of the High Court at Calcutta in its appellate jurisdiction (February 11, 1926) affirming a decree of that Court in its original jurisdiction.

The appellants were export merchants at Calcutta, and the respondents carried on business there as bankers. The respondents sued the appellants in the High Court to recover Rs.22,652 being the equivalent of four sterling bills of

* *Present :* VISCOUNT SUMNER, LORD ATKINSON, and LORD CARSON.

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exchange, two dated August 9, 1923, and two September 6, 1923. The bills were drawn by the appellants on George Knowles & Co., Ld. (hereinafter referred to as G. K. & Co.), of London, and were payable to the respondents or order; they had been dishonoured after acceptance.

The facts, which appear fully from the judgment of the Judicial Committee, were shortly as follows:—

On May 11, 1923, the appellants contracted to sell to G. K. & Co. goods to be shipped from Calcutta between July and September at a price in sterling c.i.f., U. K., payment by drafts at 90 days against a confirmed bank credit to be opened by the buyers.

On the same day the appellants, through T. S. Apcar & Co., made an exchange contract with the respondents, whereby the respondents agreed to negotiate "approved bills of exchange, drawn at 3 M/St. D/A on London at 1*s.* 4*d.* per rupee"; the abbreviations meaning "three months, sight, documents against acceptance."

G. K. & Co., under a letter of agreement, No. 237, obtained from the Eastern Bank, Ld., in London, a confirmed credit, which that bank communicated to its Calcutta branch.

On June 18, 1923, the Eastern Bank, Ld., Calcutta, sent to the appellants a letter of advice, referring to the letter of agreement No. 237, and stating in effect that they were prepared to negotiate three month bills drawn by the appellants upon G. K. & Co. up to 2080*l.*, shipping documents being handed to the bank; the letter concluded "When offering drafts for negotiation under this authority, it is imperative that this letter be produced to enable the negotiating bank to note payments on the back thereof."

Shipments under the contract took place in August and September, 1923. Upon the shipment in August the appellants drew two bills of exchange on G. K. & Co. in favour of the respondents or their order for the contract price of the goods shipped, the bills stated that they were drawn under "letter of agreement No. 237, dated May 30, 1923, signed with the Eastern Bank, Ld., London, as per advice dated June 18, 1923." The appellants tendered the bills to the respondents

for negotiation, handing them also (1.) the shipping documents, except the policies of insurance which it had been arranged should be produced in London; (2.) a memorandum showing the conversion of the amount of the bills into rupees at the rate agreed on May 11, 1923, and referring to the bills as "our 3 M/St. D/A drafts"; (3.) the Eastern Bank's letter of advice of June 18, 1923.

The respondents, after examining the documents, negotiated the bills and noted them on the back of the letter of advice, which was returned to the appellants.

On the second shipment two further bills were drawn by the appellants and negotiated with the respondents in a similar manner.

The respondents forwarded the bills and documents to London and the documents were handed to G. K. & Co. upon their acceptances; the bills were dishonoured at maturity.

The appellants, in defence to the claim, pleaded, in addition to a plea not urged upon appeal, that the respondents should have handed the documents to the Eastern Bank, and that having regard to the appellants' loss of protection under the confirmed credit consequent upon that not having been done, they were not liable upon the bills, or, alternatively, that they had a right of set-off or counterclaim to the same amount.

The trial judge (Buckland J.) made a decree for the amount claimed, holding that there was nothing to absolve the appellants from their liability as drawers. That decree was affirmed on appeal by Greaves and Rankin JJ.

1927. March 29, 31; April 1. *Merriman K.C.* and *Joseph Nissim* for the appellants. The respondents having notice of the confirmed bank credit were bound to hand the documents to the Eastern Bank for presentation to the drawers. The letters D/A in the memorandum were not a direction to present the bills to the drawees, but merely an indication that the documents were to be surrendered against acceptances, not against payment. The evidence showed

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that there would have been no difficulty in handing the documents to the Eastern Bank for the purpose of presentation to the drawees. The result of surrendering the documents to the acceptor direct was that the confirmed credit became nugatory. The respondents were in equity parties to the arrangement embodied in the confirmed credit, and could have sued the Eastern Bank under it: *In re Agra and Masterman's Bank.* (1) [Reference was made also to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2); *Urquhart Lindsay & Co.* v. *Eastern Bank* (3); *Maitland* v. *Chartered Mercantile Bank of India* (4); *Banner* v. *Johnston* (5); *Brazilian and Portuguese Bank* v. *British and American Exchange Banking Corporation* (6); *Morgan* v. *Lariviere.* (7) Further the appellants were in the position of sureties for the acceptor, having as security the confirmed credit. The respondents were bound not to do anything to impair that security: *Polak* v. *Everett* (8); *Carter* v. *White* (9); *Duncan Fox & Co.* v. *N. & S. Wales Bank* (10); *Craythorne* v. *Swinburne.* (11) Whether the respondents had notice of the suretyship before or after they negotiated the bills is not material: *Overend Gurney & Co.* v. *Oriental Financial Corporation.* (12) If the circumstances of the case do not give the appellants a defence on the bills, they are entitled to a set-off or counterclaim in respect of the respondents' breach of duty, and are entitled to damages to the amount sued for.

Sir Herbert Cunliffe K.C. and *M. R. Jardine* for the respondents. Under s. 30 of the Negotiable Instruments Act (XXVI. of 1881) the appellants were liable upon the bills upon their dishonour; there was no contract excluding that liability. The reference on the bills to the letter of advice was merely for the purpose of identifying the transaction.

(1) L. R. 2 Ch. 391.
(2) [1918] 2 K. B. 623, 659.
(3) [1922] 1 K. B. 318.
(4) (1869) 38 L. J. (Ch.) 363.
(5) (1871) L. R. 5 H. L. 157.
(6) (1868) 18 L. T. 823.
(7) (1875) L. R. 7 H. L. 423, 430 to 433.
(8) (1876) 1 Q. B. D. 669, 675, 676.
(9) (1883) 25 Ch. D. 666.
(10) (1880) 6 App. Cas. 1, 14.
(11) (1807) 14 Ves. 160, 169, 170.
(12) (1874) L. R. 7 H. L. 348, 360.

The respondents had the right to present the documents through the Eastern Bank, but they were not bound to do so. The appellants really lost their rights under the confirmed credit because they chose to negotiate the bills through the respondents. The respondents did not know the terms of the letter of credit, and not having claimed to utilize it were not in any way bound by its terms. It was essential that the documents should be handed to the drawees on acceptance, and there was no direction to the respondents to hand them through the agency of the Eastern Bank. The contention based on the law of suretyship really begs the question as to the respondents' duty. If there was no duty on the respondents to present the documents to the Eastern Bank, the confirmed credit was a security only if they chose to take that course.

Merriman K.C. replied.

May 27. The judgment of their Lordships was delivered by

Viscount Sumner. The appellants in this case were sued in the High Court at Calcutta, as drawers of four bills of exchange, by the respondents, who discounted them, the bills having been dishonoured at maturity by the acceptors, George Knowles & Co., Ld., of London. The decision went against them both at the trial and on appeal, but the High Court granted their certificate for leave to appeal to His Majesty in Council.

The appellants are export merchants in Calcutta, and on August 9, 1923, they offered two drafts for discount to the respondents, who are bankers there. Two others for the same amounts were sent on September 6. The second transaction was a mere transaction of course, following on the first.

The documents were put before Mr. Thompson, the respondent's manager, and on his approval of them the drafts were discounted. In addition to the two drafts, there were a bill of lading for twenty-five bales of gunnies to be delivered at Dundee and an invoice and mills' specification relating to them. By arrangement, an insurance policy was to be and was produced in England and it need not be further

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referred to. There was, further, a letter of advice, dated June 18, 1923, from the Eastern Bank, Calcutta, to M. A. Sassoon & Co., and a memorandum from M. A. Sassoon & Co., containing their request for discount, the amount to be passed to their credit.

This memorandum showed a conversion of the amounts of the two drafts, namely, 696*l.* 10*s.* into rupees at 1*s.* $4\frac{3}{16}d.$, as per T. S. Apcar & Co.'s contract, dated May 11, 1923, being the amount for which credit was asked. The drafts were thus described: "For our 3 M/St. D/A drafts 2048 and 2048A on Messrs. George Knowles & Co., Ld., London," and they bore the words "value received for 25 bales gunnies shipped per s.s. *Malancha* to Dundee drawn under L/Agreement No. 237, dated May 30, 1923, signed with the Eastern Bank, Ld., London, as per advice dated June 18, 1923"; but, except as showing the existence of some relevant agreement, with particulars to identify it and connect it with this particular transaction, these words do not carry the present case any further. The bill of lading for twenty-five bales of gunnies shipped by J. S. Ezra made the goods deliverable to order, and was dated August 2, and the invoice, dated August 8, was an invoice of goods by M. A. Sassoon & Co. for account of George Knowles & Co., Ld., for the net amount of 696*l.* 10*s.*

Although in the evidence nothing was specially disclosed as to the relations of M. A. Sassoon & Co. and George Knowles & Co., the transaction, so far, was of the most ordinary type. The contract with T. S. Apcar & Co. had been made by that firm as exchange brokers between Sassoon & Co. and the International Banking Corporation. M. A. Sassoon & Co., having sold the gunnies forward to George Knowles & Co., wished to protect themselves against fluctuations in sterling exchange before the shipping date arrived. Accordingly, they at once made a contract, by which they became entitled to discount for their approved drafts later on at the rate current on the day of the contract itself. They were, in a word, content with their profit on the sale, and had no mind to speculate in exchange as well.

On examining the documents put before him, Mr. Thompson apprehended the nature of the transaction above stated quite as fully as was necessary, though George Knowles & Co. and the terms of their purchase contract were unknown to him. T. S. Apcar & Co.'s exchange contract was for "approved bills of exchange, drawn at 3 M/St. D/A on London at the exchange of 1*s.* $4\frac{3}{16}$*d.* per rupee," with certain options for shorter or longer terms at rates fractionally higher or lower as specified, and the letter of advice from the Eastern Bank, Calcutta, sufficed, even if M. A. Sassoon & Co.'s name had not done so, to secure his approval of the drafts on behalf of the respondent bank. Accordingly, Mr. Thompson passed on the shipping documents to be examined by his shipping department and, being found in order, they were sent with the discounted drafts to London to be dealt with there. The form in which the International Banking Corporation instructed their London correspondents was, of course, a domestic matter and gave the appellants no further rights. The obligations arising out of the discounting of the drafts under the circumstances of this case were obligations which, as between these parties, arose in Calcutta. As the letter of advice required, the amount and date of this discount transaction were endorsed on it, and stamped with the respondent bank's name. Sassoon & Co. got credit for their Rs.10,326.7.9. On the other hand, the respondents' correspondents in London, duly following out their instructions, presented the drafts for acceptance to George Knowles & Co. on August 28, and acceptance being duly given, handed over the documents to them. Unfortunately, the acceptances were all dishonoured at maturity, in the case of the first two at the beginning of December. The events relating to the other two drafts sued on were in all respects similar, and do not require to be further mentioned.

On the face of the bill transaction, the respondents were entitled to recourse against M. A. Sassoon & Co. By their pleadings, the latter contended that pursuant to T. S. Apcar & Co.'s exchange contract, the International Banking

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Corporation purchased the drafts and no longer had the right of recourse against the drawers, that would, prima facie, have belonged to the holder for value; that in view of the existence of a confirmed credit, of which the International Banking Corporation had notice, they ought to have delivered the bills of lading to the Eastern Bank, Ld., in London, and not to George Knowles & Co.; that the appellants being precluded by this misdelivery from recovering the price of the gunnies from the Eastern Bank, were accordingly discharged from their liability on the bills to the respondents, and, in the alternative, that, if the respondents' liability for this misdelivery sounded in damages only, the amount of such damage was the same as the amounts of the bills, and could be set off so as to extinguish any liability on the bills. No custom of merchants or bankers as to confirmed credits in connection with documentary bills or otherwise was pleaded, proved, or relied on. At their Lordships' bar the appellants' counsel did not insist on the contention that the mere negotiation of the drafts pursuant to the exchange brokers' contract was in itself an out-and-out purchase of them by the Banking Corporation without recourse to the drawers in any event, and the question whether the remedy was by way of set-off or only of counterclaim for damages was not debated before them.

The conclusion of the trial judge that the transaction disclosed nothing to relieve the drawers from their liability was affirmed by the High Court, the learned judges holding that the question really turned on the documents, and that whatever assumptions might be made in favour of M. A. Sassoon & Co. as regards their transaction with George Knowles & Co., the description which they gave of the drafts, unaccompanied by any explanation limiting the effect of D/A as a description, entitled the International Banking Corporation to surrender the bills of lading to the acceptors on getting their acceptance, as they did.

The facts are as follows. George Knowles & Co. became known to M. A. Sassoon & Co. as early as September, 1922, and, after some correspondence, a contract was concluded

between them on May 11, 1923, for twenty-five bales of gunnies per month, to be shipped from July to September. So far as the evidence shows, George Knowles & Co. were then in reasonably good credit, nor does it appear that their insolvency was suspected until the time when they dishonoured their first acceptances. They were throughout personally unknown to the International Banking Corporation.

The terms on which George Knowles & Co. from the first proposed to deal and ultimately did deal with M. A. Sassoon & Co. included the following: the price was c.i.f. U.K., and reimbursement was to be by drafts at ninety days' sight against confirmed credit, to be opened in the sellers' favour upon the conclusion of each contract. After the first purchase and sale had been concluded, the Eastern Bank in London wrote to its branch in Calcutta on May 31, 1923, enclosing copies of letters of agreement with that bank signed by George Knowles & Co. on the previous day and described as being "in favour of M. A. Sassoon & Co. available to be presented at three months' sight against full shipping documents." While this letter was in the post M. A. Sassoon & Co. cabled to George Knowles & Co. on June 5, "Referring to your letters of credit, they must be confirmed irrevocably." Thereupon, on June 19, the Eastern Bank in London cabled to its Calcutta branch that the letters of agreement signed by George Knowles & Co., of which copies had been forwarded, were "now confirmed credit." The communication itself, which had obviously been made by George Knowles & Co. to the Eastern Bank in London between June 5 and 19, is not in evidence; but George Knowles & Co.'s letter of agreement addressed to the Eastern Bank in London and dated May 30, is endorsed by some one in pencil, "Made confirmed credit, June 15, 1923."

It is sufficient to quote from it the following: "We hereby authorize and request you and your agents in Calcutta to give banking facilities and accommodation . . . . against and/or negotiate on or before October 15, 1923, any . . . . bills . . . . not exceeding three months after sight and drawn on us by or endorsed by Messrs. A. Sassoon & Sons, Ld.,

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and . . . . we hereby agree duly to accept any such bill or bills for any *sum or* sums not exceeding in the aggregate 2080*l.*, and to pay the amounts of such bill or bills at maturity.

"The drawers and/or endorsers and/or the holders of such bill or bills will hand over, but merely by way of collateral security, to you bills of lading for merchandise . . . . and we agree that, in case you consider it necessary, you shall be at liberty to sell . . . . any of the said merchandise . . . . and apply the net proceeds . . . . towards payment of the said bill or bills. . . . .

"It is further agreed that the granting of the said facilities and accommodation and/or the negotiation of any bill or bills above referred to shall be optional, and that this agreement cannot be either revoked or altered in any way except in writing with the express consent of your bank. . . . ."

Of this document, which appears to have been headed "Agreement from London No. 2 (with recourse)," no copy was sent to M. A. Sassoon & Co., though a copy was sent to the Eastern Bank's Calcutta branch.

On June 18, however, the Calcutta branch sent to M. A. Sassoon & Co. a letter of advice, of which the following parts are specially material:—

"We beg to inform you that an advice has reached us from our London office of letter of agreement, No. 237, signed by G. Knowles & Co., Ld., authorizing us to negotiate a bill or bills drawn by you on George Knowles & Co. . . . .

"We are informed that bills of lading for merchandise, together with the relative invoices and policies . . . . will be handed to us. Such bills of lading should be presented to us in complete sets, made out 'to order,' blank endorsed and marked by the shipping company 'freight paid.' . . . .

"We have pleasure in informing you, that we are prepared at our option as usual to make advances against and/or negotiate any bill or bills drawn in compliance with the terms of this letter."

This letter of advice was on a printed form, and after the above words "of this letter," the form proceeded as follows:

"it being understood that this is not a confirmed bank credit, and you are in no way released from the ordinary liability of drawers." These last words from "it being" to "of drawers," were deleted, and after the signature of the Eastern Bank of Calcutta there followed two additions—namely, "Please note that this authority is a confirmed credit. When offering drafts for negotiation under this authority, it is imperative that this letter be produced to enable the negotiating bank to note payments on the back hereof."

On these documents the following observations arise. (1.) It was apparently part of the appellants' argument that the deletion of the words in the form "you are in no way released from the ordinary liability of drawers" in combination with the added words, "this authority is a confirmed credit," imports that "you are in some way released from that liability." Their Lordships cannot accept this. There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not now necessary to cite; but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added, of course, remain to be construed.

(2.) The letter of agreement, signed by George Knowles & Co., contains only the authority given and the promise made by that firm to the Eastern Bank, Ld. So far as the record goes it is not shown how George Knowles & Co. and the bank arranged that the bills of lading should reach the latter in case the drafts were discounted elsewhere, nor is any actual agreement disclosed by which George Knowles & Co. undertook to accept drafts presented by other parties, though no bills of lading were tendered. The general effect of the bank's undertaking and liability may be easily surmised, but their precise terms must have been a matter of express arrangement between these two parties, and the actual undertaking of the Eastern Bank in London, which almost certainly was in writing, was not disclosed.

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(3.) What the Calcutta branch of the Eastern Bank conveyed to M. A. Sassoon & Co. in their letter of advice, which was all the information that the latter had about the terms of the agreement between George Knowles & Co. and the Eastern Bank in London, was confined, except for the second addition above set out, to transactions, in which Sassoon & Co. would send drafts, with documents attached, to the Eastern Bank in Calcutta for discount, and would then hand over to the bank drafts and shipping documents against payment or credit of the relative sum in rupees. Thenceforward the discounting bank would hold both drafts and bills of lading and, in accordance with George Knowles & Co.'s letter of agreement, could look after itself.

(4.) It is contended that in spite of the words "when offering drafts for negotiation under this authority," which authorize negotiations to the Eastern Bank alone, the succeeding words "to enable the negotiating bank," convey that the authority advised in the letter of advice extends to transactions with other negotiating banks, and should not be construed as merely meaning "to enable us when we negotiate the drafts. . . . ." Even if this be so (and it is a very summary way of converting the terms of a discount offer by one bank into an undertaking applicable to actual discounts by any other bank), it does not follow that, if a third party bank negotiates, all the undertakings and all the dealings referred to in this letter of advice will be or can be made applicable forthwith to such a substituted transaction.

If the drafts had been offered for discount to the Eastern Bank in Calcutta, or if, by arrangement between George Knowles & Co. and the Eastern Bank, the drafts of Sassoon & Co. had been drawn on the latter (*Chartered Bank of India* v. *Macfayden* (1); *Scott & Co.* v. *Barclays Bank* (2)), the transaction would have been one of a normal type, which has often been explained and illustrated in the decided cases, and it would have completely met all the mercantile necessities which such a transaction has been devised to meet (*Guaranty Trust Co. of New York* v.

(1) (1895) 64 L. J. (Q. B.) 367. (2) [1923] 2 K. B. 1.

Hannay & Co. (1)), except the possibility that the rate of exchange might have moved against Sassoon & Co. between May 11 and August 9. The negotiation of the drafts with the International Banking Corporation under the circumstances above detailed is, as far as reported cases go, a novelty. It is here that the difficulty of this case begins. In the case of *Chandanmall Benganey* v. *National Bank of India* (2) some of the drafts mentioned were dealt with in the same way and under similar circumstances, but nothing in the decision throws any light on the legal consequences, which this peculiarity may involve.

According to the evidence on both sides, however, there was nothing extraordinary, still less irregular, in offering drafts, fortified with the letter of advice of the Eastern Bank's confirmed credit, to be discounted by another bank such as the International Banking Corporation. Mr. Young, an official of the Eastern Bank in London, said that the postscript to the letter of advice meant that the negotiating bank might be the Eastern Bank or any other bank, and in this he was not apparently speaking merely of his own view of the wording of the postscript but of banking practice generally, for the plaintiffs' manager, Mr. Thompson, said frankly that, although the letter of advice " asked for the documents to go to the Eastern Bank, Ld., Calcutta," it was " quite customary for other banks to negotiate drafts under credits belonging to other banks," and, in fact, " likelier than otherwise." He said, further, that there was no particular difficulty about his sending the drafts and documents to the Eastern Bank for presentation to George Knowles & Co., and that with different shippers he would have done so, but in this case he thought that the credit arrangement had been superseded by M. A. Sassoon & Co., that for some reason they were deviating from the credit by sending in the bills for discount D/A, that they wanted to allow (sic) these as documents against acceptance, and that he was willing on the strength of their names to discount the drafts on those terms—namely, D/A. Under the terms of the letter of advice,

(1) [1918] 2 K. B. 623, 660. (2) (1923) I. L. R. 51 Calc. 43.

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he would have handed the documents to the Eastern Bank and not to George Knowles & Co., but he thought this credit arrangement had been superseded.

Of this evidence the appellants' counsel have made much, as they were fully entitled to do, and their Lordships think it right to consider the main question in the case on the footing of these answers, as both the Courts in Calcutta appear to have done. They accordingly put aside certain contentions advanced by the respondents as follows. Neither the letter of agreement nor the letter of advice nor any document, which relates to them, makes them in terms "irrevocable," the term "confirmed" alone being used, yet both words were stipulated for by M. A. Sassoon & Co. on June 5, 1923. According to Mr. Thompson, the appearance of both words on the credit document is an indispensable formality. It is not easy to see in what respect either word or both of them together would carry the matter further than the word "contract," used in its strict sense, would have done, for apparently a confirmed credit is something, formerly provisional, and now turned into something definite by way of promise, and the word "irrevocable" simply closes the door on any option or locus penitentiæ, and makes the agreement definite and binding—in other words, creates a true contract, which will either be performed or be broken. The trial, however, proceeded on the footing that the credit given in favour of M. A. Sassoon & Co. and referred to in the letter of advice, was in all essentials what they had bargained for, and at their Lordships' bar it was too late to argue the contrary. So, too, without actually holding that the words added to the letter of advice, which refer to "the negotiating bank," mean that the credit and the advice are in law available to the full to any bank other than the Eastern Bank of Calcutta, which may discount the drafts mentioned therein, their Lordships will discuss the present case on the footing of the view taken by Mr. Thompson himself, that such was their meaning to the minds of business men.

As the present case is one of first impression, two general observations may be useful. So long as trade is proceeding

in its ordinary course without violent fluctuations in prices, and so long as all parties concerned are in good credit, banks, whose business it is to facilitate trade, can and no doubt do by voluntary arrangements among themselves smooth out small difficulties and ignore informalities, when no serious consequences are likely to result. When, however, a court of law is for the first time called upon to fix legal liability, by declaring what the intentions of the parties must be taken to have been, it becomes necessary to consider how an unruffled and unquestioned business would work out, if difficulties were to arise such as would at each step bring out the risks to be run and the responsibilities to be borne by one or other of the respective parties. Suppose a fall in the price of gunnies, which made it important for the buyers to avail themselves of any legal ground open to them for refusing to take up the goods or to meet the bills; suppose a financial crisis, which for the time being seriously involved the reputation of the bank which had granted the confirmed credit; in either case suppose a discounting house, ignorant, as here, alike of the exact terms of the purchase contract and of the agreement for the confirmed credit; how is the discounting house to know whether it can safely give up the bills of lading to the London bank on the one hand or whether, on the other, it can reckon on acceptance of the drafts only when it has the bills of lading available to be handed to the drawee against acceptance? It is to be remembered that, common as it is for the grant of the credit to be made on the terms that the grantors are to be secured by possession of the bills of lading, other forms of security are sometimes used, the choice of the form depending on the relations between the two parties concerned and the solvency of the importing firm: see, for example, the terms of the credit in *The Kronprinsessan Margareta* (1), and in *Prehn* v. *Royal Bank of Liverpool.* (2) The legal rule must be one which will fit and make sense of the transaction equally under fair-weather conditions and under foul.

Take again the practical side of the matter. There are

(1) [1921] 1 A. C. 486, 511. (2) (1870) L. R. 5 Ex. 92.

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many business situations where an offer is made, in which it is hardly possible to ask questions or to go behind the documentary materials put forward by the proposer. Underwriting a slip is one; discounting a trade draft is another. Mr. Thompson, from the documents before him, had to judge whether he would approve or disapprove, whether he would risk taking the documents or risk letting the business go past him. To ask questions, even if there had been any one at hand to answer, might have betrayed either ignorance of his own business or a desire to know too much about his customers'. The exchange memorandum told him quite plainly that the drafts were D/A, which meant "documents against acceptance." Here was an instruction as to the use he was to make of Messrs. Sassoon & Co.'s documents of title. True, it did not say who was to present the documents to the acceptor, but it was evident that, if the letter of advice was right in saying that the Eastern Bank was to have and keep the bills of lading, the documents could not be handed by the respondents to George Knowles & Co. against acceptance at all. As discounters, their first duty, both to M. A. Sassoon & Co. and to themselves, was so to present the drafts for acceptance, as either to get them accepted or to get them dishonoured for lack of acceptance. In their Lordships' view, the respondent bank was entitled and bound to follow this instruction. In face of it, there could be no question of such a misdealing with the drawers' rights by way of security as would afford any answer to their action.

Two answers have been attempted in argument. The first is that the drafts were tendered as D/A drafts only to comply with the terms of T. S. Apcar & Co.'s exchange contract, which fixed a standard rate for D/A drafts and options for drafts on other terms, varying from the standard by fixed fractions. It is said that all Sassoon & Co. wanted was to get the rupee exchanged at 1*s.* $4\frac{3}{16}d.$ There is, however, some confusion in this. Sassoon & Co. wished to get this rate of exchange, and had to claim it under their contract by presenting drafts of such a description as that rate attached to, but the drafts were still described as D/A drafts,

and, whatever the object which was immediately in view, D/A drafts they actually were. That these letters meant "documents against acceptance" was common ground, and accordingly some clear reason has to be shown for saying that, in the circumstances of this case, they nevertheless meant documents against the Eastern Bank's acceptance, which, in fact, they had not undertaken to give, or documents to the Eastern Bank against George Knowles & Co.'s acceptance of the draft, if they should be willing to give it without receiving the documents. Mr. Ralph Sassoon actually answered the question, "Can you explain why D/A was put in the memo.?" by saying, "Because the documents were deliverable to, and for acceptance of, the Eastern Bank." This was an impossible construction. Equally so is the contention that D/A is a direction merely as to the time when the shipping documents are to be surrendered and not as to the person who is to receive them. Evidence as to the meaning of D/A as a term of art might possibly have gone as far as this, but, as the case stands, D/A on this view would be an incomplete and ambiguous direction and the party directed cannot be blamed if it was reasonably interpreted and acted on: *Ireland* v. *Livingston*. (1) In any case, it assumes that the discounting bank is to interfere radically with what is prima facie the right of the accepting consignee on what may be a mere surmise. The drafts were for acceptance of George Knowles & Co., and if the documents, that is, the shipping documents, were deliverable to the Eastern Bank, then, as far as the International Banking Corporation was concerned, these acceptors would not get any documents in exchange for their acceptance. It hardly appears that on either side there had been much consideration of the rights and obligations arising out of this use of the letter of advice as applicable to a negotiation with the International Banking Corporation.

Accordingly, a second and much more ingenious answer was given to their Lordships. On the faith of the confirmed credit, for which they had stipulated, M. A. Sassoon & Co. proceeded

(1) (1872) L. R. 5 H. L. 395.

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to put the shipment in train to come into the hands of those who might be interested in it in London. This was done by placing the documents in the hands of the International Banking Corporation in Calcutta, with notice that the transaction was backed by a confirmed credit. After this the credit could not be revoked by the Eastern Bank. Merely to hand to a banker a draft styled D/A and a corresponding letter of credit must be deemed in law to tell him that the bills of lading are to be handed to the issuer of the letter of credit and not to the acceptor of the draft, and his remedy is to decline to discount, however approved the bill may be as a bill, if he does not like these terms. It is true that M. A. Sassoon & Co. did not bring the terms of the credit to the corporation's notice, nor did they know them themselves, but this does not matter. They put the corporation in the position of being able to sue the Eastern Bank in London on the credit in accordance with the principle of *In re Agra and Masterman's Bank* (1), and on inquiry it would be ascertained, as business experience would have led the corporation to anticipate, that the condition precedent to the Eastern Bank's obligation to give effect to the credit was the delivery of the bills of lading to them. All was really plain sailing. If only the bills of lading were given up to the Eastern Bank, somehow or other the drafts would be met either by George Knowles & Co., if they accepted and paid without getting the consignment or the documents which represented it, or by the Eastern Bank, if they did not. The delivery of the bills of lading to the Eastern Bank in London, it was said, became matter of contract between the appellants and the respondents, as the result of the discounting transaction, so that the latter's recourse against the former was suspended and became ineffectual unless and until the Eastern Bank made default. In effect, the respondent bank was provisionally substituted for M. A. Sassoon & Co. as sureties for the acceptors on the bills, though this substituted suretyship would itself be defeasible in case of any wrongful failure to pay on the part of the Eastern Bank.

(1) L. R. 2 Ch. 391.

This argument was properly and indeed indispensably reinforced by the principles, which apply when a surety has secured his secondary liability by placing in the principal creditors' hands security which belongs to himself in the first instance. Here Sassoon & Co., having shipped the gunnies under such a form of bill of lading as reserved the jus disponendi to themselves until the documents were delivered with their authority to the buyers for the purpose of passing the property, placed these instruments, representing the goods while afloat, in the Banking Corporation's hands, as collateral security giving them a special property in the goods, but remaining available generally for the protection of the sureties to whom they belonged. They also placed within the reach and control of the principal creditors another and still more important security, the commercial pivot of the whole transaction—namely, the confirmed credit of the Eastern Bank—and to this precisely the same rules applied as to the bills of lading. If the Banking Corporation entered into the transaction with notice of the existence of a confirmed credit of an ordinary banking character without knowing its exact terms, that was their own affair. They took the risk of its being such that they could comply with them. If for any reason they failed so to deal with the bills of lading as to secure to the drawers recourse to the confirmed credit, then, pro tanto, the drawers would be discharged. Between *In re Agra and Masterman's Bank* (1) on the one hand and *Polak* v. *Everett* (2) on the other, the discounting bank would be quite able to look after themselves.

Their Lordships are unable to give effect to these contentions. The principle of the decision cited is one applicable between the discounting bank and the bank which, having established the credit in favour of the acceptor, gives notice urbi et orbi of its willingness to abide by the operation of the credit through the machinery of drafts discounted before acceptance. If the respondents discounted the drafts on the faith of the invitation (if any) contained in the letter of advice, the decision in *In re Agra and Masterman's Bank*

(1) L. R. 2 Ch. 391. (2) 1 Q. B. D. 669.

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entitled them, if they chose to do so, to sue on the credit agreed by the Eastern Bank with George Knowles & Co. as if they had been parties to it from the beginning. If they had not discounted on the faith of that invitation, the principle would not apply, and Mr. Thompson said clearly in effect, what Sassoon & Co. can neither complain of nor deny, that for him the name of M. A. Sassoon & Co. was good enough in this case, and the confirmed credit was accordingly superfluous. Apart from this, however, the principle would only confer a right of action on the International Banking Corporation against the Eastern Bank, if they chose to exercise it, but it would not impose on them a duty towards M. A. Sassoon & Co., so as to modify the ordinary right of recourse at all events or in any event. It is a matter between the respondent corporation and the Eastern Bank, not between M. A. Sassoon & Co. and the respondent corporation.

On the other hand, they think that the letters D/A are a complete answer to the part of the argument, which rests on the obligation of the principal creditor not to waste the surety's security. If the creditor complies with the surety's instructions, there can be no further responsibility. The whole gist of the complaint, as far as the confirmed credit is concerned, is that by not handing the bills of lading to the Eastern Bank the respondents failed to satisfy the conditions precedent to their liability and so nullified the confirmed credit. The appellants' description of the drafts as D/A drafts destroys the validity of this complaint. M. A. Sassoon & Co. instructed the respondents to surrender the documents to the acceptors against their acceptance, and this was done. Again, if the obligation of the principal creditor not to deal unreasonably or imprudently with the securities is relied on, the result is the same. All the information given to the respondents by the drawers of the drafts, who, after all, had made their own bargain with the acceptors, pointed to the quite normal intention of giving the buyer of the gunnies control of the goods on the faith of his acceptance to the drafts. This was prima facie the

intention, in fact, so far as the information given indicated. If the confirmed credit modified this, it was not for the discounting bank to make guesses or to run risks, but for the drawers to say what their wishes were. Their Lordships cannot say that the conduct of the International Banking Corporation was unreasonable under the circumstances.

No doubt, as soon as M. A. Sassoon & Co. had got a rupee credit for their sterling drafts at 1*s.* $4\frac{3}{16}$*d.*, they thought as a matter of business that they had done with the transaction, and it may be disappointing to merchant shippers to find that it nevertheless remained at their risk. It may be also true that, when the Calcutta banks fell into a course of business, which may be called a good-natured convenience to merchants or a far-sighted development of legitimate business exactly as you please, it would have been better to have intimated to the trade, that the banks were not undertaking all the burdens of shippers' transactions, however they might turn out, but this is not the present issue. How proof of a custom of bankers and merchants, applicable to these particular facts, would have affected the decision is a matter on which it is not permissible to speculate. It may also be that the case was not as completely presented at the trial as merchants generally might have desired, but with this their Lordships cannot deal. The appellants are not in a position to show that, when they discounted these drafts, they bargained that the transaction should be without recourse, and in order to qualify their direction, given by the letters D/A, and to limit the respondents' prima facie right of recourse against themselves, they must show some contract with them to that effect, or some breach of contract or of duty on their part, which would have that effect in law. No authority has been produced which enables them to do so, and their Lordships cannot say that any legal principle leads to that conclusion. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondents: *Sanderson, Lee & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1927 *May* 5; *July* 29.

DONALD CAMPBELL AND COMPANY, LIMITED . . . . . } APPELLANTS;

AND

POLLAK . . . . . RESPONDENT.

Costs—Non-Jury Action—Discretion of Court—Appeal—Appeal to Court of Appeal without Leave—Jurisdiction of Court of Appeal—Appeal to House of Lords—Competency—Order as to Costs founded on Error of Law—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Rules of Supreme Court, Order* LXV., *r.* 1.

Notwithstanding the general rule of practice of the House of Lords, that no appeal lies for costs only, the House will entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law.

So *held* by Viscount Cave L.C., Viscount Haldane, Viscount Dunedin, Lord Atkinson, and Lord Blanesburgh (Viscount Sumner and Lord Shaw of Dunfermline dissenting).

Dicta of Lord Selborne in *Metropolitan Asylum District Managers* v. *Hill* (1880) 5 App. Cas. 582, 584 and of Sir Joseph Napier in *Yeo* v. *Tatem* (1871) L. R. 3 P. C. 696, 702 approved and followed.

Huxley v. *West London Extension Ry. Co.* (1889) 14 App. Cas. 26 applied.

Caledonian Ry. Co. v. *Barrie* [1903] A. C. 126 not followed.

Opinion of Lord Shaw of Dunfermline that Scottish appeal practice is not affected by this judgment.

By virtue of s. 49 of the Judicature Act, 1873, s. 5 of the Judicature Act, 1890, and Order LXV., r. 1, of the Rules of the Supreme Court, the costs in a non-jury action are left to the discretion of the Court or judge, and an order as to the costs is not subject to appeal except by leave of the Court or judge making such order. Although a successful defendant in a non-jury case has, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs, the Court has an absolute and unfettered discretion to award or not to award them to him. This discretion must be exercised judicially, and the judge ought not to exercise his discretion against a successful party on grounds wholly unconnected with the cause of action. In such a case *semble* the Court of Appeal might be compelled to intervene. But when the judge, intending to exercise

* *Present:* At the hearing of the preliminary objection: VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD BLANESBURGH. At the hearing of the appeal on the merits: VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

his discretion, has acted on facts connected with or leading up to the litigation, the Court of Appeal is prohibited by statute from entertaining an appeal from his decision.

Civil Service Co-operative Society v. *General Steam Navigation Co.* [1903] 2 K. B. 756, so far as it deals with costs, explained and distinguished.

F. King & Co. v. *Gillard & Co.* [1905] 2 Ch. 7; *Edmund* v. *Martell* (1907) 24 Times L. R. 25; and *Ritter* v. *Godfrey* [1920] 2 K. B. 47 overruled.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing an order of Branson J. as to costs.

The respondent was employed by the firm of Donald Campbell & Co., who were merchants in the City of London, as manager of their Eastern department. The firm was subsequently converted into the appellant company, and the respondent became its managing director. The company had since gone into liquidation. In 1921 two actions were commenced, one by the members of the firm and the other by the liquidator in the name of the company, against the respondent and one Boris Said, a Russian, and these two actions were consolidated and were tried by Lord Darling and a special jury. The action by the firm related to four transactions which had been entered into between the firm and Said, and they claimed that the respondent had made a secret profit in certain dealings with Said, which the firm were entitled to recover. In the second action the company claimed that the respondent was also a partner with Said in a number of other transactions entered into between Said and the company and that an account should be taken of the losses made on those transactions and that the respondent should be made liable for those losses as a partner with Said. Said entered an appearance, but took no further part in the proceedings. The jury found a verdict for the plaintiffs and judgment was entered accordingly.

The Court of Appeal ordered a new trial of both actions, but on an appeal to the House of Lords the House allowed the verdict and judgment in the action by the firm to stand, but ordered a retrial of the action by the company.

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This action was retried by Branson J. without a jury. Branson J. gave judgment for the respondent, but without costs, mainly on the ground of the misconduct of the respondent in the action by the firm in concealing his partnership with Said. That misconduct was, in his view, the real reason why the second action was brought by the liquidator and the real reason which forced him in the proper execution of his duty to bring the action, because, when once it was shown that the respondent had concealed his partnership with Said in respect of certain transactions, the liquidator could not discover from the books of the company when that partnership ceased.

The respondent appealed, without leave, to the Court of Appeal from so much of the order of Branson J. as related to costs.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) allowed the appeal upon the ground that the trial judge, in dealing with the costs, was not entitled to take into account the proceedings in the other action and had therefore no materials upon which to exercise his discretion.

On the present appeal coming on for hearing an objection was taken on behalf of the respondent to the competency of the appeal upon the ground that it was an appeal for costs.

The preliminary objection was originally heard in June, 1926, before a House consisting of Viscount Cave L.C., Lord Shaw of Dunfermline, Lord Sumner, Lord Parmoor, and Lord Blanesburgh, when judgment was reserved. The objection was, however, subsequently set down for rehearing.

1927. Jan. 20, 21, 24. *Jowitt K.C.* and *Astell Burt* for the respondent, on the preliminary objection. The authorities from the time of Lord Eldon show that there is a well established rule that there can be no appeal to this House on a question of costs only. The respondent relies especially on *Caledonian Ry. Co.* v. *Barrie.* (1)

[LORD BLANESBURGH. You appealed to the Court of Appeal without leave of the judge. On what ground could

(1) [1903] A. C. 126.

you do that having regard to s. 50 of the Supreme Court of Judicature Act, 1925, reproducing the section in the earlier Act ?]

It does not follow that the principle in this House is the same as in the Court of Appeal. The following decisions of your Lordships' House also support the respondent's objection: *Fitzgibbon* v. *Scanlan* (1); *Tod* v. *Tod* (2); *Robertson* v. *Harford* (3); *Hunter* v. *Duff* (4); *Inglis* v. *Mansfield* (5); *M'Aulay* v. *Adam & Brown* (6); *Clyne's Trustee* v. *Dunnet* (7); *Home* v. *Pringle* (8); *Lord Advocate* v. *Lord Dunglas* (9); *Garnett* v. *Bradley* (10); *Metropolitan Asylum District Managers* v. *Hill* (11); *Fleming* v. *North of Scotland Banking Co.* (12); *Huxley* v. *West London Extension Ry. Co.* (13); *Gray* v. *Lord Ashburton* (14); see also Macqueen's Practice of the House of Lords (1842), p. 94, and Denison & Scott's Practice and Procedure of the House of Lords (1879), p. 67. Since the Judicature Act, 1873, there have been hundreds of cases in which the Court of Appeal has had to consider whether there was good cause for the exercise of the discretion as to costs, not one of which has any litigant brought to this House.

The cases cited and the text-books show that the principle has been that if this House is seised of the merits of a dispute, not merely colourably seised of them, it can do as it likes with the question of costs, but if it is not dealing with the merits, unless there is some special jurisdiction by statute or otherwise, this House ever since, at all events, the year 1813 has not entertained a question of costs only. The principle in the Privy Council, though not necessarily the same, is useful, and the following cases show that the general rule has been the same: *Wilson* v. *The Queen* (15); *Yeo* v.

(1) (1813) 1 Dow, 261, 270.
(2) (1827) 1 Bligh (N. S.) 639; 2 W. & S. 542.
(3) (1832) 6 W. & S. 1.
(4) (1832) 6 W. & S. 206, 211.
(5) (1835) 3 Cl. & F. 362.
(6) (1835) 3 Cl. & F. 385.
(7) (1839) Macl. & R. 28.
(8) (1841) 8 Cl. & F. 264, 293.
(9) (1842) 9 Cl. & F. 173.
(10) (1878) 3 App. Cas. 944.
(11) 5 App. Cas. 582.
(12) (1881) 9 R. (H. L.) 11.
(13) 14 App. Cas. 26.
(14) [1917] A. C. 26.
(15) (1866) L. R. 1 P. C. 405, 408.

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Tatem—The Orient (1); *Credit Foncier of Mauritius* v. *Paturau* (2); *Rieken* v. *Yorke Peninsula Justices.* (3)

Stuart Bevan K.C. and *Barrington-Ward K.C.* (with them *E. F. Spence K.C.*) for the appellants. This is not an appeal on a question of costs only; if it had been, the appeal from the trial judge could not have been made without his leave, and no such leave was asked for or given, but the Court of Appeal, considering it was not a question of costs only, heard the appeal, and the question before the Court of Appeal was whether the trial judge had misdirected himself in law in the exercise of his discretion as to the costs by having considered matters which in law he was not entitled to consider, matters about which evidence had been given in the trial of the action by the firm against Pollak, but about which no evidence was given at the retrial before the trial judge of this action by the company against Pollak. By their decision the Court of Appeal have saddled the appellants with the costs of two very expensive actions and the costs in the Court of Appeal, together amounting to thousands of pounds. The Court of Appeal were wrong in deciding that the judge had considered matters which he was not entitled to consider.

This is not an appeal to vary the discretion of the Court of Appeal, but an appeal to decide whether that Court was right in law in holding that the judge had taken into consideration matters not material. That Court having found that the discretion was not judicially exercised, the question becomes one as to non-discretionary costs, and it is submitted that the rule, which in the earlier cases Lord Eldon and Lord Brougham no doubt summarized as being that no appeal would lie to this House on the question of costs only, in fact referred only to costs which were in the discretion of the Court or judge.

[LORD BLANESBURGH. Lord Halsbury puts the point very clearly in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (4)]

(1) L. R. 3 P. C. 696, 698, 702.
(2) (1876) 35 L. T. 869.
(3) [1908] A. C. 454.
(4) [1903] 2 K. B. 756, 765.

[They referred to *Ritter* v. *Godfrey*. (1)] There is no case exactly in point. An appeal will lie to the Court of Appeal, to the Privy Council and to the House of Lords on a question of costs, but not on a question of discretionary costs, except from the trial judge, who can give leave for an appeal from a question of costs over which he can exercise a discretion. This appeal in fact is on a question of principle. The position which obtained in *Tod* v. *Tod* (2), *Lord Advocate* v. *Lord Dunglas* (3); and in *Huxley* v. *West London Extension Ry. Co.* (4) is not distinguishable from that in the present case.

[The LORD CHANCELLOR referred to the following cases, which were prior in date to 1813: *Duvall* v. *Terrey* (5); *Cowper* v. *Scott* (6); *Huband* v. *Huband* (7); *Gould* v. *Granger* (8); *Owen* v. *Griffith* (9); *Wirdman* v. *Kent*. (10)]

"Costs only" in the rule as laid down by Lord Eldon and Lord Brougham must have been intended to refer only to discretionary costs: see *Attenborough* v. *Kemp* (11); *Richards* v. *Birley* (12); and *Wilson* v. *The Queen*. (13) The rule as laid down by Lord Eldon, if strictly construed, would seem to admit of no exception at all, so that all the exceptions to that rule even before Lord Eldon himself are only consistent with the rule being read as referring to in fact discretionary costs: see also *Yeo* v. *Tatem* (14); *Rieken* v. *Yorke Peninsula Justices*. (15) If the rule is read as referring to discretionary costs then all these cases fall outside the rule, being all non-discretionary costs cases. The decision of the Court of Appeal was not an exercise of discretion but a wrong determination of a legal principle. Even if the Court did exercise a discretion, the exercise of it was vitiated by excluding from their consideration all the reasons given by Branson J. It

(1) [1920] 2 K. B. 47.
(2) 1 Bligh (N. S.) 639.
(3) 9 Cl. & F. 173.
(4) 14 App. Cas. 26.
(5) (1694) Show. P. C. 15.
(6) (1757) 1 Eden, 17.
(7) (1713) 7 Bro. P. C. 433.
(8) (1730) Mosely, 395.
(9) (1749) 1 Ves. Sen. 250.
(10) (1782) 1 Bro. C. C. 140.
(11) (1861) 14 Moo. P. C. 351.
(12) (1864) 2 Moo. P. C. (N. S.) 96.
(13) L. R. 1 P. C. 405.
(14) L. R. 3 P. C. 696.
(15) [1908] A. C. 454.

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is clear from all the Privy Council cases that that Council have not treated the rule as laid down by Lord Eldon as excluding all appeals as to costs.

The appeal by the defendant to the Court of Appeal without leave was perfectly competent and, if so, the appeal to this House is equally competent. If the appeal to this House is not competent, neither was the appeal to the Court of Appeal.

[They also referred to *Metropolitan Asylum District Managers* v. *Hill* (1), *Caledonian Ry. Co.* v. *Barrie* (2), and ss. 3 and 12 of the Appellate Jurisdiction Act, 1876.]

Jowitt K.C. in reply. The exceptions to the rule, which has been laid down in very general terms, are all referable to jurisdiction: see *Fitzgibbon* v. *Scanlan* (3); *Tod* v. *Tod* (4); *Clyne's Trustees* v. *Dunnet* (5); *Home* v. *Pringle* (6); *Lord Advocate* v. *Lord Dunglas* (7); *Metropolitan Asylum District Managers* v. *Hill.* (1) The one case which might be said to be against the respondent's contention is *Huxley* v. *West London Extension Ry. Co.* (8), but that was a jury action, where the costs follow the event unless the Court shall for good cause otherwise order.

[The LORD CHANCELLOR. The objection fails. We will give our reasons later.]

1927. May 5. VISCOUNT CAVE L.C. My Lords, Branson J., who retried this action (under an order for a new trial) without a jury, decided the issues of fact in favour of the defendant (the respondent in this appeal), but gave judgment for him without costs. In arriving at his decision not to give the defendant his costs, the learned judge relied mainly upon the fact—established by the verdict and judgment in another action which had been consolidated with the present action—that the defendant had been guilty of improper conduct which (as he held) had induced the

(1) 5 App. Cas. 582.
(2) [1903] A. C. 126.
(3) 1 Dow, 261, 270.
(4) 1 Bligh (N. S.) 639.
(5) Macl. & R. 28.
(6) 8 Cl. & F. 264, 293.
(7) 9 Cl. & F. 173.
(8) 14 App. Cas. 26.

liquidator of the appellant company, and, indeed, had forced him in the execution of his duty, to bring the present action. On an appeal by the defendant to the Court of Appeal against so much of the judgment of Branson J. as had ordered that no order should be made as to costs, that Court held that the trial judge was not entitled to take into account the proceedings in the other action—which (as they held) had been "de-consolidated" and wholly separated from the present action by the order for a new trial of this action—and accordingly that the judge had no materials before him upon which it was right for him to exercise his discretion as to costs; and they allowed the appeal and declared the defendant entitled to his costs of action. The plaintiffs have now appealed to this House against the order of the Court of Appeal. The costs in question amount to a very large sum, as they include the costs of two long trials and several appeals. The respondent raises the preliminary objection that the appeal is incompetent as being an appeal as to costs only, and your Lordships have now to deal with this preliminary objection.

The objection appears, at first sight, to be somewhat surprising. Under s. 5 of the Judicature Act, 1890, and Order LXV., r. 1, of the Rules of the Supreme Court, the costs of a trial without a jury are in the absolute discretion of the trial judge; and under s. 49 of the Supreme Court of Judicature Act, 1873 (which was in force when the appeal to the Court of Appeal was heard), no order made by the High Court of Justice or any judge thereof as to costs only which by law were left to the discretion of the Court was subject to any appeal except by leave of the Court or judge making such order. Notwithstanding these enactments, the respondent appealed (without leave of the Court or judge) to the Court of Appeal against the order of the trial judge as to costs, and he succeeded in that appeal on the ground that the judge had no right in law to make that order; and, now that the appellants ask your Lordships to review that decision and to hold that the trial judge had such a right, the respondent objects that the appeal to this House is as

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to costs only and cannot be entertained. It would seem that, if the appeal to the Court of Appeal, which was an appeal as to costs only, was competent notwithstanding the statutory prohibition of such appeals, the appeal to this House must be equally competent notwithstanding the rule of the House which prohibits such appeals. But the respondent contends that the rule adopted by this House goes beyond the terms of the statute which binds the Court of Appeal, and that under that rule this appeal cannot be heard.

My Lords, there are passages to be found, both in speeches made in this House and in text-books of authority, which lay it down in broad terms that an appeal as to costs only will not be entertained here; but it is plain that the rule, so stated, needs some qualification. For instance, an order made contrary to a statute which gives a party a right to his costs is clearly appealable: see *Tod* v. *Tod.* (1) So, an order as to costs made by the Court of Appeal without jurisdiction must needs be subject to an appeal to this House, for otherwise the law might be broken without redress; and *Garnett* v. *Bradley* (2) and *Huxley* v. *West London Extension Ry. Co.* (3) are instances of such appeals. Why, then, should a decision of the Court of Appeal as to costs which is founded on a wrong view of the law—and in dealing with the preliminary objection this must be assumed to be the case—be exempt from review? If, on argument, it should appear that the Court of Appeal was wrong in holding that the trial judge had no right to refer to the proceedings in the consolidated action, then there was no ground on which the Court of Appeal could discharge his decision as to costs, and the order setting that decision aside was made contrary to the statute and was without jurisdiction. Why should the appellants be prohibited from putting forward this contention? The suggestion that, if the appeal were allowed on that ground, the House would be reviewing a discretion exercised by the Court of Appeal is obviously untenable;

(1) 2 W. & S. 542. (2) 3 App. Cas. 944.
(3) 14 App. Cas. 26.

for if that Court was wrong in setting aside the discretionary order of the trial judge, then there was no field for the exercise of any discretion by the Court of Appeal itself. On principle, therefore, unless there is some settled rule of the House which prevents your Lordships from hearing the appeal, I am of opinion that it should be heard.

My Lords, if the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of costs. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law.

As the contention of the respondent is wholly based on the citation of cases, I feel compelled to trouble your Lordships with a review of the decisions of this House bearing upon the point; and I have thought it well to include in order of date the relevant decisions of the Judicial Committee of the Privy Council and some statements made by Lord Chancellors when sitting on appeal from Judges in Chancery. The earliest case with which I am acquainted is *Duvall* v. *Terrey* (1), where the appeal failed on merits, and the report concludes: "And as to costs, held no cause for an appeal in this case, nor in truth was it ever known to be a cause, if the merits were against the party appellant. And so the decree was affirmed in the whole." In *Huband* v. *Huband* (2) a decree of Lord Keeper Harcourt was affirmed except as to costs. In *Gould* v. *Granger* (3) "the Lord Chancellor (Lord King) allowed an appeal from the Master of the Rolls, for costs only, and his Lordship said, he had known the House of Lords allow an appeal for costs only, tho' the old practice was otherwise." In *Owen* v. *Griffith* (4), on an appeal from a decree made by Abney J. upon a bill against an execution creditor for an account on the ground that the judge had

(1) Show. P. C. 15, 16.
(2) 7 Bro. P. C. 433.
(3) Mosely, 395.
(4) 1 Ves. Sen. 250.

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not given the defendant her costs, counsel for the respondent insisted on "the general rule that there could not be an appeal for costs only"; but Lord Hardwicke L.C. allowed the appeal, saying that the creditor was clearly entitled to his costs on the merits "if not precluded by that rule; which I have often heard so delivered by the Court. The foundation of it," he added, "was to prevent vexation and trouble; for as cases in equity often depend on abundance of circumstances, about which as the reason of mankind might differ, it would create perpetual appeals: but this is no printed rule; and it seems somewhat strict and hard to adhere to it; for since the stamp duties, costs come to be very material. Yet if it was to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience, to which a particular inconvenience ought to give way. But if a sound distinction from the rule can be made, it ought to be allowed: and it will be very unfortunate if in this case the defendant should be precluded thereby; for being an incumbrancer for a just debt, and having a lien on the estate for her costs as well as her demand; it seems to be an exception, and different from the Court's not suffering matters to be overruled merely for costs." In *Cowper* v. *Scott* (1) the Lord Keeper (Lord Northington) said that an appeal or rehearing for costs only was not to be encouraged, "because costs are merely discretionary, and depending upon particular circumstances; and when a judge has once determined the matter, a rehearing for costs should be admitted with great caution"; but upon the authority of *Owen* v. *Griffith* (2) he allowed the appeal. In *Wirdman* v. *Kent* (3) Lord Thurlow L.C. is reported to have said that the appeal in *Owen* v. *Griffith* (2) was admitted upon such an apparent mistake that upon motion for enrolment the minutes of the decree would have been altered; but (as the editor of Brown's Reports points out) Lord Thurlow can hardly have said this, as Lord Hardwicke clearly treated the case of an execution creditor as a sound exception to the rule.

(1) 1 Eden, 17, 18. (2) 1 Ves. Sen. 250.
(3) 1 Bro. C. C. 140.

I turn now to the cases which were cited in the argument on this appeal. In *Fitzgibbon* v. *Scanlan* (1) the appellant, although unsuccessful on the merits, was relieved of some of the costs thrown upon him by the order below; and Lord Eldon said that, "although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters." In *Tod* v. *Tod* (2), where there was a cross-appeal as to costs only, Lord Eldon said that this House never entertained an appeal for costs "where costs are in the discretion of the Court below"; but the appellant in the cross-appeal, who was entitled by statute to his costs, succeeded in his appeal. In *Burkett* v. *Spray* (3) a decree was varied on appeal as to costs only, Lord Lyndhurst saying that "an appeal would lie in respect of costs, if any principle were involved, and they were not merely given as consequential on the decree." In *Brodie* v. *Sinclair* (4), where a pursuer who had succeeded as to a part of his claim had been ordered to pay the defender's costs of suit on the ground "that the expense of litigation in this case had been mainly, if not altogether, occasioned by the pursuer insisting for the other items in the account which had not been sustained," this House set aside that part of the decree, Lord Brougham L.C. saying: "It is quite true that the costs are in the discretion of the Court in all cases, but I find there is no such rule as that assumed for the interlocutor." In *Inglis* v. *Mansfield* (5) the appeal failed on merits, but the appellant was relieved of the costs thrown upon him by the judgment, and Lord Brougham said: "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon

(1) 1 Dow, 261, 270.
(2) 2 W. & S. 542.
(3) (1829) 1 Russ. & My. 113.
(4) (1831) 5 W. & S. 567, 568.
(5) 3 Cl. & F. 362, 371.

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to review the case, the Court of Review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised." In *Clyne's Trustees* v. *Dunnet* (1) Lord Cottenham used similar expressions, but said that the order of the Court below as to costs was right. In *Angell* v. *Davis* (2), where a decree had been made giving a trustee his costs of the cause out of the estate, Lord Cottenham, relying on *Owen* v. *Griffith* (3); *Cowper* v. *Scott* (4); and *Burkett* v. *Spray* (5), allowed an appeal by the beneficiaries against that part of the decree, and ordered the trustee to pay the costs of the cause so far as they had been occasioned by his own misconduct. In *Home* v. *Pringle* (6) the House dismissed an appeal by trustees claiming to be entitled to their costs, Lord Cottenham saying: "A Court of Appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone."

I pass to the more recent cases, and first to *Wilson* v. *The Queen*. (7) In that case one of the appellants (Cole) appealed to the Queen in Council against a decree of the Admiralty judge at Sierra Leone on the ground that, although he had succeeded in the Court below, he had not been awarded the costs of the proceedings; and Lord Cairns said: "Their Lordships are of opinion that, with regard to the appellant Cole, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule, that an appeal for costs could not be entertained." The order for costs which was the subject of appeal was clearly discretionary. In *Yeo* v. *Tatem* (8), an action in the Admiralty Court for damages caused by collision, the defendants pleaded a general denial and also a special defence founded on the doctrine of res judicata. On evidence that the damage had been caused by a third

(1) Macl. & R. 28.
(2) (1839) 4 My. & Cr. 360.
(3) 1 Ves. Sen. 250.
(4) 1 Eden, 18.
(5) 1 Russ. & My. 113.
(6) 8 Cl. & F. 264, 293.
(7) L. R. 1 P. C. 405, 408.
(8) L. R. 3 P. C. 696, 702.

party the Court gave judgment for the defendants without costs, and declined to go into the special defence. On an appeal by the defendants to the Judicial Committee, it was held that, although the issue on the special defence had become material only as regards costs, the appellants were entitled to have judgment upon it and to have the general costs of the action. The appeal was accordingly allowed; and Sir Joseph Napier, who delivered the judgment of the Board, said: "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal." This was a plain case of an appeal on a point affecting costs only, and the appeal was allowed. The same may be said of *Garnett* v. *Bradley* (1), where, the plaintiff in an action for slander tried with a jury having recovered only one farthing damages, the Court of Appeal had held that under the statute 21 Jac. 1, c. 16, he was not entitled to the costs of the action; but the House of Lords, holding that the statute of James I. had in effect been repealed by Order LV., gave him his costs. In that case the issue upon merits had been finally determined by the verdict of the jury and the judgment in the action, and the appeal to this House was plainly as to costs only; but it was not suggested that it was incompetent. In *Metropolitan Asylum District Managers* v. *Hill* (2) it was held that an order of the Court of Appeal which imposed, as a condition for a new trial, the payment of the costs of the first trial was not an appeal in respect of costs only and ought, therefore, to be entertained; and Lord Selborne stated the rule as follows: "The rule, subject to certain exceptions, is established, that an appeal is not to be allowed in respect of costs only; which means that when the merits of a question have been determined, and when a Court has thought fit to give or refuse

(1) 3 App. Cas. 944. (2) 5 App. Cas. 582, 584.

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costs, in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money but also of judicial time, for the mere purpose of reviewing that discretion." No doubt the appeal in that case was not in respect of costs only, but was an appeal against a refusal to make an unconditional order for a new trial; but the language of Lord Selborne is interesting as showing the origin and meaning of the rule under discussion. In *Huxley* v. *West London Extension Ry. Co.* (1) an appeal as to costs only was entertained, the question argued being whether there was "good cause" for depriving a litigant of costs under Order LXV., r. 1, but the decision of the Court of Appeal on this point was affirmed. Lastly, in *Rieken* v. *Yorke Peninsular Justices* (2), the Judicial Committee disallowed an appeal against an order as to costs on the ground that the Court in Australia had exercised a judicial discretion and that there had been no mistake of law.

As reliance has been placed upon a decision of the Appeal Committee established by Lord Eldon in the year 1812, it may be convenient to refer to a few decisions of that committee to which my attention has been called by the Judicial Department of the House. In *Robertson* v. *Tait* (1852) an appeal as to costs only was dismissed as incompetent, and Lord St. Leonards L.C. said: "The rule, I apprehend, both here and in the Courts below, is that you cannot appeal for costs generally. If the question of costs involves a serious question of law, then, although you only go for costs, the appeal may be sustained, because in that appeal it may be necessary to decide a question of law. Now here what has been stated shows . . . . what the general rule is; but it is equally clear that it is not a binding or positive rule." In *Marquess of Ailsa* v. *Kerr* (1853) an appeal as to costs only was dismissed, the Lord Chancellor (Lord Cranworth) saying: "You cannot have an appeal on the subject of costs where, the decree

(1) 14 App. Cas. 26. (2) [1908] A. C. 454.

being otherwise right, the discretion of the Court is exercised wrongly upon the subject of costs. . . . ." In *Sawers* v. *Monteith* (1869), on an appeal against a discretionary order as to costs, Lord Hatherley said: "The appeal upon costs only we do not proceed with." Again, in *Thallon* v. *Kinnear Moode & Co.* (1884), an appeal against a discretionary order as to costs was dismissed as incompetent. Lastly, in *Caledonian Ry. Co.* v. *Barrie* (briefly reported in [1903] A. C. 126) the respondent petitioned against the competency of an appeal on two grounds: first, that it was an appeal on costs only; and, secondly, that under the statute which was there in question an appeal would only lie on a question of law. The Appeal Committee dismissed the appeal, Lord Macnaghten saying (as appears from the shorthand note): "Their Lordships are of opinion that the objection is a good one and must prevail." It does not clearly appear on which of the two grounds the appeal was dismissed; and, in any event, the order as to costs made by the Court below was a discretionary order, the Court of Session having a very wide discretion as to costs. There is, therefore, not much to be learned from this decision.

My Lords, I have gone through this long succession of cases only for the purpose of ascertaining what is the precise rule which has been laid down by this House; for I agree that, if a rule of practice exists, it ought not now to be disturbed, and that the rule (whatever it may be) was not abrogated by s. 3 of the Judicature Act, 1876. The result of my examination appears to me to be (1.) that there is no universal rule that an appeal as to costs only will not be entertained by this House, but the true rule is as stated by Lord Northington in *Cowper* v. *Scott* (1), by Lord Eldon in *Tod* v. *Tod* (2), and by Lord Selborne in *Metropolitan Asylum District Managers* v. *Hill* (3), as well as by Sir Joseph Napier in the Judicial Committee and by Lord St. Leonards and Lord Cranworth in the Appeal Committee; and accordingly (2.) that in this House, as in the Court of Appeal, an appeal from

(1) 1 Eden, 18. (2) 2 W. & S. 542.
(3) 5 App. Cas. 582.

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a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a bona fide appeal on merits ; but (3.) that when it is alleged that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been seen) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent.

If this be the true view, then it is plain that the appeal in the present case, in which the exercise by the trial judge of his statutory discretion as to costs has been set aside by the Court of Appeal on legal grounds, ought to be allowed to proceed. I therefore move your Lordships that the preliminary objection to this appeal be disallowed, and that the costs of and consequent upon that objection be paid by the respondent in any event.

VISCOUNT HALDANE (read by LORD CARSON). My Lords, the point with which we are at present concerned in this case is whether an appeal lies to this House from a judgment of the Court of Appeal. That Court had varied a judgment of Branson J. in favour of the respondent, the defendant in an action tried by the learned judge without a jury, for damages in respect of alleged breach of contract and fraud. Branson J. had deprived the respondent of costs, amounting to a large sum, in the exercise of what he considered to be the discretion he could exercise. The Court of Appeal altered this, directing that the judgment in favour of the respondent should carry costs. Assuming for the purposes of the present question that the appellants may develop a substantial case in support of the decision of the trial judge depriving the successful defendant of his prima facie title to his costs, there remains a preliminary question which has to be decided at this stage of the appeal to your Lordships' House. It is whether the appeal, which is limited exclusively to the question of these costs, is

one which, according to the principle that regulates our practice, can be entertained at all. When a trial takes place without a jury the costs, under s. 5 of the Judicature Act, 1890, and Order LXV., r. 1, are in the discretion of the trial judge, and under s. 49 of the Judicature Act, 1873, there is to be no appeal from the exercise of this discretion except by leave of the judge who made the order. Nevertheless the respondent appealed against the order without leave, and succeeded in the Court of Appeal, upon the ground that the judge had no right in law to make it for the reason he did. Branson J., in deciding not to allow costs to the defendant, relied on the circumstance that the verdict and judgment in another action against the defendant, in which the plaintiffs were different persons from the appellants, the plaintiffs in the present case, established facts which justified the liquidator of the appellant company in the execution of his duty in bringing the present action. But the Court of Appeal, holding that Branson J. was not entitled to take into account the proceedings in a different case with different parties, considered that the learned judge had not proper materials before him on which he was at liberty to exercise his discretion under the rule as to costs.

The question we have to deal with presents this peculiarity. The appeal to the Court of Appeal was brought without leave. This may have been legitimate on the ground that the judge was said to have been without a reason on which to proceed legitimately in the way he did. But it seems curious that if that were so an appeal to this House raising what seems to be a precisely analogous question should be incompetent. If it is so this must be for some special reason which has been definitely established by this House in relation to its own proceedings, and which goes beyond the principle applied in the Court of Appeal. It seems as though it must be shown that this House is precluded by its established decisions from entertaining an appeal which relates exclusively to costs given by the Court below in the exercise of its discretion, even when the exercise of that discretion has arisen out of error about matter of law.

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This question is one the answer to which must be collected from a study of the authorities. It is not enough that s. 3 of the Appellate Jurisdiction Act of 1876 gives in general terms a right of appeal from the Court of Appeal to this House. The general words employed in this section may not be sufficient to interfere with the special practice of this House if such a practice is established. What the section was directed to was to get rid of the repeal of appellate jurisdiction effected by a statute of 1873, and not to the alteration of the settled practice where jurisdiction existed.

When the authorities are examined they disclose, what is apt to happen unless a very definite principle is being enunciated, a certain vagueness in judicial statement. Where a rule is laid down it is sometimes qualified by exceptions which are vaguely expressed. If, however, the cases are read as a connected series of utterances the result seems to me to admit of two different contentions. One is that it is established that when an appeal to the House of Lords resolves itself into a question only of costs the House will refuse to entertain it. It is added that this refusal is not confined to cases where discretionary costs have been dealt with below in accordance with an exercise of a discretion conferred and not infringing any principle of law. It is said that costs can be dealt with where they are ancillary to a variation of the substance of a judgment, but that otherwise there is no power to deal with them unless the case comes within certain nominate exceptions referred to in the course of the discussion. In effect these are said to be : (1.) instances in which the order as to costs has been made personally against parties who have as matter of law a right to be exempted from them, such as trustees and mortgagees ; (2.) instances in which costs have been ordered to be paid out of a particular property to the prejudice of persons interested in it and not before the Court ; (3.) instances in which a statutory or analogous legal title has been disregarded. All of these are exceptions in which a substantive right is said to have been violated, as distinguished from cases in which it is claimed that there has been what is merely a non-judicial and in that restricted

sense improper exercise of the function of the judge to the appellant's disadvantage. Mere error in law not of a special character is accordingly in this view not enough to give ground for an appeal.

The observation at once occurs that the exceptions which the authorities relied on for this conclusion illustrate are upon this interpretation of the restriction curiously limited in nature and unconnected in character. So far as they go they certainly do not give ground for the assertion of a more general principle, such as that this House will make an exception to the rule against hearing an appeal against a mere award of costs where any general principle of law has been disregarded.

Speaking for myself, after examination of the authorities, I do not think that they establish the list of exceptions collected above as an exhaustive list. If an order as to costs were, for example, made without jurisdiction, I do not think that they show that there could be no appeal to get rid of the illegality committed. Surely the burden lies heavily on those who assert that this House has precluded itself by its decisions from entertaining such an appeal, and from dealing in this case with such a decision of the Court of Appeal based on want of jurisdiction, as freely as that Court dealt with the decision of Branson J.

The second and alternative interpretation of the scope of the authorities admits of this. It concedes that the settled practice of this House, and indeed of the higher Courts of Appeal in England generally, is to refuse to admit appeals as to costs alone where these have been disposed of by the Court below as matter of discretion. But as to what is an exercise of mere discretion and what is in reality a declaration based on imagined legal principle is not so clear. In 1749, when Lord Hardwicke was laying the foundations of the modern system of equity procedure, he laid down a principle which admits of costs under certain conditions being made the subject of appeal. He said of the rule that there cannot be an appeal for costs only, that it was "no printed rule," and that while it was for the general convenience that the

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rule should be maintained, a sound distinction where it could be made ought to be allowed. That was in *Owen* v. *Griffith*. (1) I cite the case, not as fully defining the principle as it exists to-day, but as showing that in the days when it was being developed its non-rigid character was emphasized. In inquiries into the origin and scope of rules of practice of this kind a genetic method seems essential.

Pursuing this method, the conclusion to which the language of the leading authorities seems to point is that where a discretion as to costs has been exercised on material that is illegitimate or is non-existent, or in violation of some principle of substantive right, an appeal will be entertained. Turning first to the question as it stands to-day in the Court of Appeal, I think that this is established there. That it should be so is important, for the restriction on appeals for costs as stated in the decisions of this House is not stated as though it were the outcome of a principle which is peculiar to the House. In *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2) the plaintiffs sued to recover money paid on a consideration that had failed. The learned judge who heard the case gave judgment for the defendants, but as they would not accept suggestions made by him for a settlement he deprived them of their costs. They appealed, and the Court of Appeal said that there were no materials before the judge upon which he could legitimately exercise a discretion to this effect, and that accordingly he had no power to make the order. "No doubt," said Lord Halsbury, who presided at the hearing, "where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised, must be satisfied." Why is this principle not applicable to appeals to this House? No doubt your Lordships have power to define the conditions on which such appeals are to be allowed. But have you done so in such a fashion as to exclude appeals as to costs when the

(1) 1 Ves. Sen. 250. (2) [1903] 2 K. B. 756, 765.

discretion has been exercised in a way which is alleged to be contrary to the law? Certainly Lord Hardwicke did not say so. In *Huxley* v. *West London Extension Ry. Co.* (1) the question which arose related to another part of the Order, which enabled the trial judge to direct that where he found "good cause" the costs were not to follow the event, as was to be the normal course where the trial was with a jury. It was said here, that where the discretionary power to deprive of costs for good cause had been duly exercised, that exercise was not to be subject to any review. And it was also said by the House that not any reason which may have been assigned for disallowing the costs of a party who had been successful in getting a verdict must necessarily be accepted as good cause. If the trial judge gives effect to considerations which do not constitute "good cause" his decision is not protected from review. The House therefore listened to an appeal which was only concerned with costs.

My Lords, there are observations in *Metropolitan Asylum District Managers* v. *Hill* (2) which appear to me to be only consistent with the view I have preferred, and in *Yeo* v. *Tatem* (3) that view was distinctly enunciated in the judgment delivered for the Judicial Committee of the Privy Council by Sir Joseph Napier. In the hearing of that case James and Mellish L.JJ., both great authorities on the old general practice, took part.

The decision of the Appeal Committee in *Caledonian Ry. Co.* v. *Barrie* was cited in support of the contrary general proposition that the House will not entertain an appeal against costs only. That case is briefly reported in [1903] A. C. 126, but it was not a decision of the House, and no reasons are given, and it is not clear that the preliminary question may not, in reality, have turned equally on the provision of the Judicature Act of Scotland, which confines appeals to this House in cases commenced in the Sheriff's Court to matters of law alone. I find myself unable to treat this imperfectly reported case before the Appeal Committee

(1) 14 App. Cas. 26. (2) 5 App. Cas. 582.
(3) L. R. 3 P. C. 696, 702.

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as having been intended to overrule, or as having been capable of overruling deliberately, the principle underlying the other decisions to which I have referred. There are further decisions which support the view I have expressed, but on these I do not think it necessary to enter, because they have been referred to by the Lord Chancellor, in whose analysis of them I concur. I think, with him, that when the right to costs, or the existence of a discretion as to costs, depends on the decision of a question of law or procedure, an appeal on that question will be heard. The general rule against appeals as to costs is, as Lord Hardwicke said as long ago as 1749, a "paper rule," in the sense that it is a prima facie statement capable of being displaced in this way.

I therefore think that the respondent is not entitled to succeed upon his present contention.

VISCOUNT DUNEDIN. My Lords, before forming my opinion in this case I had the great advantage of perusing the opinions of the noble Lords who had heard the case on the former occasion. These opinions being equally divided were a sure proof that the case was not easy of determination, and I therefore think that no apology is needed for saying that my opinion has not been arrived at without much thought and hesitation. The opinions to which I have referred have so thoroughly analysed the numerous decided cases that it would be quite useless to do so again. I shall, therefore, in the remarks I venture to address to your Lordships, assume complete familiarity with the facts of the case and with the many decisions. I have myself come to the conclusion that it is not possible to say that this House has in terms laid down a rule which will settle this case. I do not think that that is a matter of great surprise, because I think it is plain that the precise question could not have arisen before the Judicature Act, and since then no case which raises the point has reached your Lordships' House. It follows that our duty now is to lay down the rule which is to guide future practice.

It was natural that one should search with avidity for a precise decision which settled the matter. At one time during the discussion I thought I had found such a case in *Caledonian Ry. Co.* v. *Barrie* (1), but on further reflection I felt that this was not so. In the present case the Court of Appeal has altered the judgment of the trial judge as to costs, because it considered that the trial judge had been influenced by evidence which was not legally before him. They could not, no leave to appeal as to costs having been either asked for or given by the trial judge, under the terms of s. 49 of the Judicature Act, 1873, simply apply their own discretion to the point of whether the costs should be allowed or not. In *Barrie's* case the Inner House of the Court of Session, who have, by Scottish law and practice, just as full discretion as the judge or judges whose judgments they are reviewing, did look, as they were entitled to look, to certain evidence, and on their view of it came to the conclusion that the judge from whom the appeal came had been right. The result, so far as appeal to this House is concerned, would have been the same if they had held he was wrong.

The nearest approach to a general rule, indeed so far as expression is concerned it might be taken as a general rule, is, in my opinion, what Lord Watson said in the case of *Metropolitan Asylum District Managers* v. *Hill* (2) : " I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing but the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case ; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties."

(1) [1903] A. C. 136 ; in the Inner House of the Court of Session, 5 F. 30.
(2) 5 App. Cas. 582, 586.

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It would, however, have been, I think, impossible in view of the numerous judgments and the varying forms of expression contained therein to pick out the dictum of one judge and say it settled the rule as laid down by this House. It follows, in my view, that your Lordships have now for the first time to lay down the rule by an authoritative judgment.

Now before stating what I think the rule should be I wish to state a preliminary proposition. It has not strictly to do with the rule, but I think it is necessary before going to the rule. That proposition is that if in any case the merits are raised by a competent appeal before this House, raised bona fide and not merely colourably with a further intent, then, however infinitesimal the pecuniary value of the merits may be in comparison with the pecuniary value of the costs, yet appeal will lie, and the costs may be dealt with with a free hand.

I come now to the rule when the appeal is for costs alone. It is to be remembered that the appeal is always from a Court of Appeal, and it is that judgment which is to be held appealable or not. What has happened in the former stages is, for the moment, immaterial. Further, I am using the words " costs alone " as meaning when the costs are the only stake. I am not for a moment saying that these words have always been so used by others, but I am using them in that sense, and in so doing I am, I think, doing the same as Lord Watson when he spoke of nothing but the judgment of costs being involved.

The rules I would wish to lay down are these. Appeal will lie :—

1. If an express statutory provision applies and it can be shown that the Court of Appeal has disregarded it. An illustration may be found in the case of *Tod* v. *Tod*. (1)

2. If a rule of law and not mere discretion could decide the question. Illustration : *Lord Advocate* v. *Lord Dunglas* (2) and *Huxley* v. *West London Extension Ry. Co.* (3)

(1) 2 W. & S. 549. (2) 9 Cl. & F. 173.
(3) 14 App. Cas. 26.

3. If the Court of Appeal has based its judgment on a point of law which may or may not be erroneous. Illustration: the present case.

In all other cases no appeal will lie.

I do not fancy there is any controversy as to the soundness of my first two rules. It is the third that is controverted. My Lords, I confess I think the justification of the third is that without it there would be grave injustice done. The position under the Judicature Act of the Court of Appeal is very peculiar. When an appeal comes to them as to costs awarded by the discretion of a judge, they cannot exercise their discretion instead of his unless leave to appeal from his order as to costs has been given by him. By a long series of decisions the Court of Appeal has held that that does not prevent them upsetting what the judge has done if they can find that he had no proper materials on which his discretion was exercised. Having so found, it strictly becomes the duty of the Court of Appeal to refer the matter back to the judge for a proper exercise by him of his discretion as to costs. It may be doubtful whether this view is sound, but it has been acted on so consistently and so long that, being, after all, a question of procedure, your Lordships would not now wish to interfere with it. Nothing would suit the appellants better than if you could, for the judgment of the Court of Appeal would simply disappear and Branson J.'s judgment would stand. But, as it is, it would surely be very unjust that the respondent here could get rid of the trial judge's judgment upon the point of law that he had considered matter which it was illegitimate for him to consider, and that then that view could not be overruled if erroneous by this House. This House is then revising not a discretion but a legal opinion that no discretion had been exercised. I am, therefore, of opinion that the appeal in this case is competent.

VISCOUNT SUMNER (read by VISCOUNT DUNEDIN). My Lords, on both the occasions when this preliminary objection has been argued at the Bar, the question has been, as I understood, whether any rule of this House existed which limited

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the competence of appeals for costs and, if so, how that rule had been defined by your Lordships' predecessors. On neither was there question of laying down a new rule, except in so far as the application of an old rule to new circumstances may itself be said to renew it. I think it is necessary to note this, because there is a singular lack of decided cases on the point in this century, and the precise issue raised in this appeal could not have arisen before the orders and rules of 1875, and could not previously have been contemplated even constructively. This appeal really rests upon authorities decided in the Court of Appeal upon the meaning and effect of the Judicature Act and the order and rules made under it on the subject of costs, where there has not been a trial by jury. There has been no case in this House upon that effect of the rules, for I am convinced that *Huxley* v. *West London Ry. Co.* (1), whatever bearing it may have, is not now decisive. If it were, why have the older authorities been reviewed at all? To this case I must return later.

My Lords, after the first argument I examined as exhaustively as I could the cases before this House and the Appeal Committee, both reported and unreported, which seemed to touch the point, and also the cases on costs in the Privy Council, and I submitted to your Lordships a detailed statement of them, on whichever side they appeared to be, with the conclusions that I drew. These have not found any favour with your Lordships, and it would only be tiresome to examine all the cases again. As, however, the second argument has only confirmed my former view, and as it would be discourteous to dissent from your Lordships' better judgment without assigning reasons, I ask leave to trespass on your Lordships' time with a statement of the results of my examination of the cases and some observations on the present position of this appeal.

A hundred years ago the practice of the House as to appeals for costs only was not new, but it had not been formulated in published reports and decisions, still less in any regulation of the House itself. The general subject, especially as it was

(1) 14 App. Cas. 26.

dealt with in Chancery, was familiar, and the distinction between costs, as to which certain persons had vested rights, and costs, which were entirely in the discretion of the Court, was well known. Still the question, whether and if so under what circumstances costs, which were in the discretion of the Court, constituted appealable subject-matter, was not and could not be a matter of general principle. In the absence of statutory regulation it was a matter of practice to be settled by the tribunal of the proposed appeal alone. In the case of an appeal to the House of Lords this practice derived its authority from the House. The rules adopted by the Privy Council or on a rehearing in Chancery might be known to be like those adopted by the House, and to the extent of that similarity might be contemporary evidence to show what the rule of the House was, but they could not even indirectly govern or prescribe it. It is not as though a uniform and consolidated body of rules had been laid down for the three tribunals, so that a case in the one would be any authority as to the practice of another. If this is right, the crucial examination of the decided cases is considerably limited in its scope.

Looking then at the opinions expressed by noble and learned Lords and the decisions of the House thereafter arrived at, there is abundant evidence that the formula "no appeal as to costs only" was regarded as a sufficient, if loose, description of the rule, and that, understanding the costs in question to have been costs in the discretion of the Court below, there is no adequate authority for treating that rule as doubtful or as admitting of fresh exceptions. The reported cases show very early, that "costs" in this formula did not mean all or any costs, but only costs that had been in the discretion of the Court below. Step by step costs given by statute, costs of trustees, and costs of incumbrancers by way of mortgage or otherwise, were decided to be outside the rule. They were the subjects, respectively, of rights by law vested in certain parties antecedently to and independently of any Court's exercise of its discretion in their favour. On similar grounds the immunity of the Crown from having to pay costs constituted another vested exception,

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but these cases lend no aid to the contention, that costs become an exception to this rule of incompetence, whenever the discussion of the order below involves what is called a "question of law." I think this has never been decided, and the dicta most favourable to the appellant fall far short of it. Lord St. Leonards leaves it in doubt whether it is upon the emergence of any question of law or only of a serious one, that the competence of an appeal as to costs depends: *Robertson* v. *Tait*. Lord Cranworth's language would seem to show that, for a wrong exercise of discretion as to costs, there can in no case be an appeal: *Marquess of Ailsa* v. *Kerr*; and Lord Selborne, on the other hand: *Metropolitan Asylum District Managers* v. *Hill* (1), appears to be content with the vague statement that discretion is not interfered with "in the absence of any settled principle upon the subject," whatever that may mean. His words should be read in connection with those of Lord Blackburn and Lord Watson in the same case, by which I think they are considerably limited. On the facts of that case, however, the question was not one of disregard of a settled principle as to the grant or refusal of costs, but of an order regarding the allowance of an appeal on the merits, which the Court of Appeal had clearly no jurisdiction to make. The House has so often declared in terms that an appeal as to discretionary costs is incompetent and will not be proceeded with, and has so often dismissed appeals accordingly, that the appellants' argument ought not to be that *Huxley's* case (2) was a case as to discretionary costs, and is therefore in point, but that their own appeal is one as to jurisdiction, like *Huxley's* case (2), and is governed by it for that reason, which I have not understood them to allege. With the very doubtful exception of *Brodie* v. *Sinclair* (3) I have not found any case, in which your Lordships' House has entertained or allowed an appeal as to discretionary costs only, without some addition of the merits of the cause or of a question of jurisdiction or vested legal right. In *Brodie's* case (3) the

(1) 5 App. Cas. 582, 584. (2) 14 App. Cas. 26.
(3) 5 W. & S. 567.

appellant had succeeded at the trial, though not as to all the items, and had been ordered, nevertheless, to pay all the unsuccessful defender's costs. Some rule of Scottish law was apparently vouched in justification of this singular order. Lord Brougham L.C., after inquiry, satisfied himself that there was no such rule, and accordingly the appeal succeeded. Here again the Court below had disregarded the pursuer's legal right, which was not to be compelled to indemnify another for outlay neither incurred at his request nor necessitated by his breach of the law. The rule has been repeatedly stated (e.g., *Fitzgibbon* v. *Scanlan* (1)), that, if a question on the merits be appealed, provided it be raised genuinely and not merely colourably, the House will hold itself free to modify the order made as to costs below, even if it dismisses the appeal on the merits. I cannot think that such a rule was needed, or would have been laid down, if the real mind of the House was that even discretionary costs could be made the subject of an appeal by themselves, if any question of law was added or involved. If this was the latent rule of the House, it already included their patent but narrower rule, and this express statement of it was merely otiose and confusing.

My Lords, in 1835, *Inglis* v. *Mansfield* (2), Lord Brougham is reported as having said that the Privy Council rule and the rule in Chancery too were then the same as that in the House of Lords. How this may have been it is hard to tell, for, scanty as are the reported decisions on the subject in the House of Lords before that date, in the Privy Council I think there is hardly one. The later decisions we must read for ourselves. I wish to make one general remark as to the Privy Council cases, which is equally applicable to the review of causes in Chancery. In the latter Court always, and in the Privy Council often, the appeal is a first and only appeal. In the case of the Privy Council the appeal is not infrequently from Vice-Admiralty Courts abroad or from Courts of Ecclesiastical Jurisdiction in England. It may well be that, for that reason, the Judicial Committee's general

(1) 1 Dow, 261, 270. (2) 3 Cl. & F. 362.

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rule against appeals for costs only should be less strict than in the case of your Lordships' House, which is always a tribunal at least of second appeal. I cannot help thinking that this is a material consideration. Test it thus. If Mr. Pollak's appeal had failed in the Court of Appeal, how would a second appeal to this House have been regarded then ?

The case of *Yeo* v. *Tatem* (1) has been much relied on by the appellants. It is true that it is a case in which the immediate benefit to be derived from the appeal was to get an order for payment of costs, but I do not think that no other matter than a right to costs was involved in it. Sir Joseph Napier's words show that the appeal was taken out of the general rule against allowing appeals for costs only, because there had been a mistake upon some matter of law, which governed or affected costs or involved the application of principles of law. The matter of law there in question was not simply failure to give costs. It was a substantive error in declining to exercise jurisdiction to decide the issue as to recovery of full satisfaction for the matter of the plaintiff's claim in a previous personal action at law. This could only have been decided in favour of the appellant, and he would have thereby gained the advantage of being able to plead res judicata, if the matter were ever raised again. As the law then stood it was his vested legal right to have all the pleaded issues decided one way or the other : *Rex* v. *Johnson*. (2) As the report in 40 L. J. Adm. 29, 30 shows, the respondent's main argument was that, as the alleged satisfaction was made in an action in personam and the Admiralty proceeding was in rem, neither the special plea nor the general issue sufficed to bring the common law proceedings before the Admiralty judge as a matter requiring adjudication. The dispute was therefore as to the judge's jurisdiction, the existence of which the respondents denied, and not as to his right to exercise it. Legal rights at that time constantly found expression in terms of pleading, and I think this discussion, technical as it looks, was really the natural way in which to raise the complaint that the appellant

(1) L. R. 3 P. C. 696, 702. (2) (1839) 6 Cl. & F. 41.

had not enjoyed the right secured to him by law and was not merely appealing about a failure to give him rather more costs than he actually got. It is thus as an appeal against the act of the Admiralty judge in declining jurisdiction to the appellant's prejudice that *Yeo* v. *Tatem* (1) was subsequently understood in *Rieken* v. *Yorke Peninsula Justices* (2), though it is true that Lord Collins, in stating the grounds on which the appeal was dismissed, says both that the Court below had exercised discretion and that there had been no mistake in law. This is equivalent to saying that the justices had not declined jurisdiction, and that there was nothing appealable about their decision. He goes on to say that the Privy Council rule was the same as your Lordships' and so it was, if this is the right construction of the decision.

So much as to the current of authorities, which fix the substance of the rule. Assuming that the form in which it should be stated is, that there is no appeal as to costs only, I see no escape from the present objection merely by saying that this appeal, though an appeal as to costs, is not an appeal as to costs only. Nothing is gained by saying it is an appeal as to a question of law as well. I think this expression only leads to confusion. You do not add a question of law to a question of costs; the two things are not in pari materia. You raise a question of law, which is a question of the law of costs. A question of law must be a question as to the law affecting some subject-matter, and so with a question of fact. The only subject-matter here is costs, and the only question of law is whether, in this case, the judge's discretion as to costs was exercisable in either of two directions or in one only. Justiciable questions are not divisible into three kinds, questions of law, questions of fact, and questions of discretion. Judicial discretion as to costs goes to the judge's powers over questions of law and questions of fact, but the powers themselves alike are powers over costs and costs only. The question suggested here is, whether the respondent's conduct in the first (the firm's) action was in any sufficient way made evidence before

(1) L. R. 3 P. C. 696. (2) [1908] A. C. 454.

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Branson J. on the trial of the second (the company's) action, which appears to be a question of fact, and to be decisive of the matter one way or the other, but in any case I do not know what arguable question about costs there could be other than mere questions of fact that would not be some sort of question of law on the legal subject of costs. In the Court of Appeal, however, the decisions have so copiously laid down limitations and directions for the exercise of a judge's discretion as to constitute a body of jurisprudence, which tends to destroy that free exercise of his statutory powers, which the Legislature conferred.

The relevancy of the inquiry into the effect of the reported cases on the present occasion is twofold. Firstly, if it is laid down that the rule of the House always was such as to extend to appeals, which nowadays arise under Order LXV., r. 1, where a judge sitting alone has deprived a successful party of costs and has not given leave to appeal, then in future discussions of other cases, coming under the same class but differing in their features from the present appeal, it will be open and may be necessary to go back to the old authorities in detail and to seek in them, and probably with success, reasons for distinguishing such other cases and excluding them from any appeal. Secondly, in the minds of some at any rate, the Judicature Act, 1876, s. 3, presents a difficulty in the way of any rule limiting appeals at all, unless it can be affirmed that it is one which existed before that Act was passed, and can therefore be deemed not to have been affected by it. I do not understand your Lordships to decide that all matters as to costs are appealable. Some remain incompetent still, s. 3 notwithstanding. I take it, for example, that *Caledonian Ry. Co.* v. *Barrie* (1) must still render incompetent any order of the Court of Appeal as to costs, which are in its own discretion, for it related to costs, which were in the discretion of the Court of Session. Hence the importance of discovering whether it really can be said that the rule existing before 1876 extended to the present case, or whether it is not really a question of making a new rule now.

(1) [1903] A. C. 126.

My Lords, my own view would be that in a matter of practice your Lordships are and always were masters, and that no general statute as to jurisdiction could be read as limiting the right to mould the cursus curiae. This seems to have been the view, which underlies s. 11 of the Act of 1876. I think that the rule, both originally and all along, was a practice rather than a principle, a matter of self-defensive policy, like the maxim "De minimis non curat lex" or the Privy Council rule as to concurrent findings of fact, and these are clearly questions of the way in which the House exercises its jurisdiction. Such matters must be capable of modification, whenever your Lordships think it expedient, from time to time. Particularly must this be so where a new regulation of practice opens your Lordships' doors to new subjects of appeal not hitherto entertained, when the only question in this view would have been one as to the expediency of the change, but this has not been the matter in debate, and I will only say that I am not at present persuaded on this head.

I should also like to point out, what I think may be very important in any further proceedings, that I do not understand your Lordships to pronounce any conclusion as to the validity of the practice, long as it has prevailed in the Court of Appeal, of entertaining appeals from a judge below, brought without his leave, against the exercise of his discretion as to costs when sitting without a jury. The principles on which this is done and the grounds on which it is supported are very conveniently stated by referring to what was said by Lord Halsbury in the *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1) This may stand for a numerous body of decisions. These decisions have not been put in the arguments on the present objection. Not unnaturally, Mr. Jowitt, whose client had appealed to the Court of Appeal successfully, did not argue that the decisions, under which this had been done, were wrong, but this does not alter the fact, that they are not binding on this House, have never come before it for approval or the reverse, and

(1) [1903] 2 K. B. 756, 765.

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will be open to review on future occasions. The fact that counsel did not dispute them in this case cannot, of course, make your Lordships' present decision equivalent to an affirmation of them.

Huxley v. *West London Extension Ry. Co.* (1) is, no doubt, a case of importance in this connection, but I think it must be clear that its value lies in analogy only. It is not a decision on the rule in the *Civil Service Co-operative Society's* case. (2) I see no difficulty in reconciling the fact that the House entertained the appeal in *Huxley's* case (1) with the existence of a rule, good or bad, that it will not entertain appeals as to costs only. The question being "Was there good cause?" the decision did not touch the question "Was there good enough cause?" The ground of the appeal was that the Lord Chief Justice had acted without jurisdiction, surely an appealable matter apart from the mode in which he dealt with the costs. If he acted without jurisdiction the litigants' legal rights were invaded, just as in *Yeo* v. *Tatem* (3) they were disregarded. Order LXV., r. 1, has the force of law, and *Huxley's* case (1) arises under the second proviso, which it contains. The structure of the proviso is that, where the matter has been tried by a jury, the costs shall follow the event and be independent of the judge's order, unless the occasion arises, which alone gives him jurisdiction to intervene, that is the existence of "good cause." The question of its existence, since his jurisdiction depends on it, must be appealable; a judge cannot give himself jurisdiction by finding that he has it when, in fact, he has not. The rule, where the trial is without a jury, is laid down on totally different lines. The costs are then in the discretion of the Court, and there is no express statement of anything which limits it or is the foundation on which jurisdiction depends. Costs, which are in the discretion of the Court, are prima facie costs, which are got from the judge according to his view of the case before him, and they are not the subject of standing legal prescriptions, vesting in a litigant a prior legal right to certain costs

(1) 14 App. Cas. 26. (2) [1903] 2 K. B. 756.
(3) L. R. 3 P. C. 696.

at all. If you come to think of it, costs, which are in the discretion of the judge, must also be in his indiscretion, and so the only question that remains outstanding is the question of jurisdiction. In saying this, I am painfully aware that I am departing from the line which has long been followed in the Court of Appeal. There the cases have been steadily assimilated, whether the trial was by judge and jury or not, and the extent, to which under this process the exercise of the judge's discretion has now been prescribed to him by decisions of the Court of Appeal, as matters of law, may well be collected from the judgment of Atkin L.J. in *Ritter* v. *Godfrey*. (1) Further, by the words of the principal Act itself, the judge's order as to such costs is made expressly, and prima facie absolutely, unappealable without his leave. There is no doubt here about jurisdiction, for the subject-matter is simply costs, whether an order for costs is made or is refused, and those costs are entirely within the judge's discretion since he tried the cause. His jurisdiction is complete, if the cause has proceeded before him. "The necessary hypothesis of the existence of materials, upon which the discretion can be exercised," is merely a condition precedent to the exercise of a discretion, which the judge possesses, if he proposes to exercise it otherwise than in one way. In the face of a rule which places costs in the judge's discretion, it is impossible to argue that the successful litigant has by law a right to costs, in the sense in which that is said of trustees' costs or costs given by statute. Now this condition is only implied, if it exists at all, but the implication, according to Lord Halsbury, is not only that the right to exercise the discretion, otherwise than in one way, is conditional, but also that the question of the existence of that condition is itself appealable, notwithstanding the statutory words. These questions are quite different from those which arose in *Huxley's* case. (2) How they should be answered is not a question which now arises for decision, but for the purpose of emphasizing what I have ventured to say about the complete distinction between *Huxley's* case (2) and the issue in this appeal, I would point

(1) [1920] 2 K. B. 47, 54. (2) 14 App. Cas. 26.

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out two things. First, an implied condition, unlike an expressly limited jurisdiction, even if it can be implied at all, may nevertheless not be appealable matter, for the Act may mean the judge himself to be the sole judge of the existence of the condition, as he is of the other matters that guide him in the exercise of his sole discretion. The second, is that to imply such a condition as an appealable question, if it is merely rested on the proposition that the judge must act judicially, is a construction deserving of close scrutiny: A judge, sitting in the seat of justice and acting as a judge, may sometimes deal with costs as with other things, injudiciously, but in the matter of costs, which are in his discretion, an injudicious order is not open to review. If, then, the statement that he must act judiciously really means more than this, it is no doubt true, but in common experience it is an injunction never disregarded. Certainly during the argument we were presented only with somewhat fantastic suggestions of non-judicial conduct, and such cases, if they occur, are but a dubious ground for implying rules about self-misdirection and the existence of evidence fit to be considered by a reasonable man, which really belong to trials by jury.

My Lords, I should desire to add two observations on another aspect of the case. Mr. Pollak appealed to the Court of Appeal claiming that Branson J. had gone outside his discretionary power and had fallen into an error of law in so doing, which was appealable. He won. He now says that by the rules of your Lordships' House the matter is no further appealable. It is now contended that grave injustice would be done, if we refused to entertain the appeal on the appellants' allegation, for this purpose deemed to be capable of being established, that the Court of Appeal in its turn was guilty of error of law and that the trial judge was not. As this involves hearing all the facts of the appeal, it makes any rule, which has to be enforced by an objection in limine, quite useless, for the merits will always have to be fully heard on the appellants' allegation that, when they are heard, the error in law will appear. Further, though it may be

surprising for this House to have a rule differing from that adopted by the Court of Appeal, or to refuse to review that Court's decision on the same ground as that, on which it undertook the task of review, the question is not whether our rule is surprising, but whether it exists. For the rest, I am frankly unable to understand how the fact, that Mr. Pollak sought the Court of Appeal and won there, can assist the appellants in showing that they, in their turn, must have a corresponding right of appeal to your Lordships. With great respect, I think that the objection should have been allowed, and that in any case the decision should be no more than this, that your Lordships, in the exercise of your power over the practice of this House, think fit to proceed with the appeal.

LORD ATKINSON. My Lords, I think the respondent's objection to the hearing of the appeal fails. I concur with the judgment of the Lord Chancellor on this point. He has dealt with the authorities touching it so exhaustively that it is quite unnecessary for me, agreeing as I do with the conclusion at which he has arrived, to deal with them afresh at any length. I base my opinion mainly upon the principle upon which the two following cases have been decided—namely, *Huxley* v. *West London Extension Ry. Co.* (1) and *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2) The first of these two was an action brought by the appellant Huxley against the railway company for damages alleged to have been sustained by him through the negligence of the latter while carrying him as a passenger on their line. He claimed to receive 3000*l.* The defendants pleaded that there was no negligence on their part, that there was contributory negligence on the plaintiff's part, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendants, if any, and lastly that the plaintiff was not injured as alleged. At the trial before Lord Coleridge C.J. and a special jury a verdict was returned for the plaintiff for 50*l.* The Chief Justice, though applied to by the company's counsel to exercise the

(1) 14 App. Cas. 26. (2) [1903] 2 K. B. 756.

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power conferred upon him by Order LXV., r. 1, and to deprive the plaintiff of his costs, declined to exercise any jurisdiction in the matter, upon the ground that the later decisions of the Court of Appeal (especially that in the case of *Jones* v. *Curling* (1), had made the principles upon which this jurisdiction was to be exercised unintelligible to him. The plaintiff accordingly entered up judgment for himself for 50*l.* and costs. My Lords, I think it would be illuminating to consider at this stage what was the nature and scope of the judgment of the Court of Appeal in the case of *Jones* v. *Curling* (1), which the Chief Justice found so unintelligible. The action in that case was brought to recover possession of six parcels of land. The defendants, availing themselves of the provisions of Order XIX., r. 15, which corresponds with Order XXI., r. 21, of the Rules of 1883, pleaded as a defence that they were in possession of all the closes claimed. The jury found for the plaintiffs as to four of these closes, numbered respectively 1, 2, 3 and 5, and for the defendants as to closes 4 and 6. The respective portions recovered by the plaintiffs and defendants were about equal in area, the plaintiff's portion being valued at 4950*l.* Lord Coleridge C.J., before whom the case was tried, made an order that the costs of both parties should be added together, and divided, apparently equally, between the plaintiffs and the defendants. This order was obviously not an order that the costs should follow the event, but rather an order that on the ordinary system of taxation they should not follow the event. The appellants appealed to the Court of Appeal. Brett M.R. is reported to have expressed himself thus. (2) He said: "Now from this order" (the order as to costs) "an appeal has been brought to this Court, and the first question for us to decide is whether we can entertain any appeal, and, if so, to what extent? I am of opinion that this Court has a right, and is bound, to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs." At the bottom of the same page the Master of the Rolls says: "The condition which gives the judge upon a trial before himself

(1) (1884) 13 Q. B. D. 262. (2) 13 Q. B. D. 267.

and a jury jurisdiction to make an order as to costs is, whether there was a good cause or not existing, and I am of opinion that that is a subject-matter of appeal. Whether there was a good cause or not is a question of fact, and the Court of Appeal must consider whether in their judgment that fact did exist, and if they disagree as to this with the judge who tried the action they must allow the appeal." Bowen L.J. expresses his opinion on the matter with his well known felicity of language. (1) Referring to Order LXV., r. 1, he said : " That rule begins with placing in the discretion of the Court the costs of all proceedings in the Court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the judge and are to follow the event, except in one case, which is, if the judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled ; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the judge depends. When, however, this jurisdiction is established, then I think there is no appeal unless the judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all. . . . . It being open for us to decide whether there was good cause here for making the exceptional order by which the costs do not follow the event, we are driven to consider what is good cause within the meaning of this rule. . . . . 'Good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make." Fry L.J.

(1) 13 Q. B. D. 271.

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said (1): "It appears to me that the question whether the facts exist which give the judge the discretion must be the subject of appeal..... I will not attempt to give any definition of what 'good cause' is, but it plainly must be something which renders it reasonable that the judge should interfere with the rule that the costs should follow the event." He then points out that the verdict and judgment in the case were distributive, the event with which they dealt not being single, and that upon taxation the costs would therefore follow the distinct issues, and says: "Is then the fact of the success of the plaintiff on some issues, and of his failure on other issues, by itself 'good cause' for interfering with the rule that the costs follow the event? I am bound to say that it appears to me not to be so. I am of opinion, therefore, that there was no good cause shown, and consequently that the Lord Chief Justice had not jurisdiction to make the order, and that the order must be set aside."

In *Huxley's* case the Court of Appeal made an order that the defendants should have liberty to renew their application to Lord Coleridge, and that if he declined to exercise his jurisdiction under Order LXV., r. 1, they should apply to the Divisional Court. A stay of execution was given in the meantime. On December 18, 1885, the defendants accordingly renewed their application for an order depriving the plaintiff of his costs. On January 3, 1886, the Lord Chief Justice heard the arguments, and on April 5 following made an order that the plaintiff be deprived of his costs for the reasons given in the report of the case. (2) The Lord Chief Justice delivered a judgment which covered nine and a half printed pages of the report. On the first of these pages he states, as I understand it, what are the facts which he considered amounted to "good cause" for depriving the plaintiff Huxley of his costs. The statement runs thus: "In the case of *Huxley* v. *West London Extension Ry. Co.* the plaintiff had preferred an extravagant and extortionate claim for compensation—3000*l.*—not merely in the formal

(1) 13 Q. B. D. 274. (2) (1886) 17 Q. B. D. 373, 374.

statement of claim but in the particulars delivered in the action; he had supported it by fraudulent statements and dishonest acts; and endeavoured to substantiate it before the jury by evidence which they very properly disbelieved." The Court of Appeal affirmed the decision of the Lord Chief Justice. The plaintiff Huxley appealed to the House of Lords against this order of the Court of Appeal. (1) The appeal was heard by the following six members of this House —namely, Lord Halsbury L.C., Lords Watson, Bramwell, FitzGerald, Macnaghten and Herschell. Four of these noble Lords gave long judgments. Lord Macnaghten stated he agreed with the conclusions at which his learned friends had arrived, and Lord Herschell expressed his concurrence with the opinion Lord Watson had delivered. The House entertained the appeal, and decided it on the ground that the statement as to Huxley's conduct in instituting and supporting his action, as stated by Lord Coleridge C.J., constituted "good cause" for his depriving Huxley of his costs. The judgments delivered in the case are very valuable, inasmuch as they deal with the proper construction of Order LXV., r. 1, and indicate what was the true meaning and reach of the words "good cause" used in the Order, and next the important question whether Huxley's appeal was to be dealt with and regarded as an appeal on "costs alone" or the same thing "costs only." Lord Watson, while stating that he would not attempt to give a general definition of "good cause," said he might give an incomplete definition of it, and indicated what these words, in his view, meant in the Order and what they embraced. In his view, he said, "they at all events embrace . . . . everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense." And he lays it down that as long as the judge or Court deals with considerations of this kind, the sufficiency or insufficiency of those considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they

(1) 14 App. Cas. 26, 33.

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are acting within their jurisdiction and their decisions are final and conclusive. On the other hand, he said, if they give effect to considerations which do not constitute "good cause" within the meaning of the rule they exceed the limits of their jurisdiction, and on that ground their decisions are not protected from review. Lord Halsbury's judgment is practically to the same effect. The judgment of the Court of Appeal dealt solely with the question whether Huxley's conduct and action, as described by Lord Coleridge, amounted to proof of "good cause" for depriving him of costs within the provisions of Order LXV., r. 1. There was not, in the Court of Appeal, any suggestion that the verdict found for Huxley should on any ground be set aside or modified or that the damages awarded to him should on any ground be diminished. The appeal dealt solely with the question of the existence of "good cause" under Order LXV., r. 1, for depriving a successful litigant of his costs. The only relief asked for from the Court of Appeal or this House was that he might be declared entitled to these costs. The appeal to the House of Lords was likewise an appeal dealing solely with costs, i.e., an appeal to get rid of the order of the Court of Appeal which deprived Huxley of costs. It is difficult to see how an appeal that only aims at annulling an order which deprives a litigant of his costs, because of his own conduct and not because of the merits of his action, is not an appeal dealing solely with costs. As an example of the practical application of those principles I refer to the second of the above mentioned cases—namely, the case of the *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1) There the defendants chartered to the plaintiffs a steamer to bring a party of sightseers to Spithead and other places to see the review of the fleet to be held on the occasion of King Edward VII.'s Coronation. The review was first postponed to June 25. The amount to be paid to the defendants was the lump sum of 1500*l.* The plaintiffs paid them 250*l.* on the signing of the charter, and the balance 1250*l.* on June 18. On June 25, when the review was postponed, notice was

(1) [1903] 2 K. B. 756.

given by the plaintiffs to the defendants that they would not require the use of the ship. Before the postponement the defendants had expended 500*l.* in fitting out the steamer. The review did not, in fact, take place till the month of August. The plaintiffs sued the defendants to recover the sum of 1500*l.* as money paid on a consideration which had failed. At the trial before a judge alone, Bigham J. (as he was then), it appeared that there had been some negotiations between the parties for a settlement of the dispute, and the learned judge expressed a desire that the matter should be left to him to say what, under the circumstances and apart from the strict legal rights of the parties, should be done. The defendants declined to take this course, and refused to accept another suggestion of the learned judge—namely, that they should be content to retain the amount of the expenses they had received and their costs. In the result the learned judge gave judgment for the defendants, but ordered that each of the parties should bear their own costs. The plaintiffs appealed against the judgment in favour of the defendants, contending they were entitled to recover the sum they had paid. And the defendants appealed from the order of the learned judge that each of the parties should bear their own costs. The appeal was heard before the Earl of Halsbury L.C., sitting in the Court of Appeal, Lord Alverstone C.J. and Cozens-Hardy L.J. The plaintiffs' appeal against the order of the learned judge was dismissed, and on reference to the defendants' cross appeal against the award of costs, the Lord Chancellor is reported to have said (1): "No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted

(1) [1903] 2 K. B. 765.

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the suit, and finally succeeded. In the judgment of Bigham J., and in the judgment of this Court, they are right; and it practically comes to this—that the learned judge has deprived the persons sued of what, prima facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross appeal must succeed, and that the defendants are entitled to their costs."

It is, I think, perfectly clear from these authorities that if a judge in a case tried before him and a jury should, by the exercise of the discretion given to him by Order LXV., r. 1, deprive a successful litigant of his costs, the materials upon which he exercises that discretion, if it is to be properly exercised, must be materials proved in that case to exist. It is not enough that they should be imagined, or suspected, or, without proof, believed by the learned judge to exist, nor is it enough if they should exist in a suit different from the suit tried, and the judge should mistakenly suppose that they had been established in this latter suit and act upon that false assumption. That it appears to me is what has occurred in this case. Besides, it should always be remembered that the discretion which is to be exercised under this Order and Rule is a judicial discretion. It is not a judicial exercise of this discretion to order a litigant who has been completely successful in a suit and against whom no misconduct is alleged to pay the costs of the proceeding: *Kierson* v. *Joseph L. Thompson & Sons.* (1) Irrelevant matters cannot be relied upon by a judge as constituting "good cause" for depriving a successful litigant of his costs, such as his putting forward in his defence to a money demand the Gaming Act: *Granville & Co.* v. *Firth* (2), or the Statute

(1) [1913] 1 K. B. 587. (2) (1903) 19 Times L. R. 213.

of Limitations: *Elms* v. *Hedges* (1), or the expression by the jury of their opinion as to how the costs should be borne. The rule that no appeal shall lie to the House of Lords on a question of costs alone is not a statutory rule. It is merely a rule of practice. It was shaped, adopted and applied long before our expeditious and effective Court of Appeal was created. Upon what rational principle this rule, if it be a desirable one, is to be applied to appeals to the House of Lords and not to appeals to the Court of Appeal, it is difficult to see. The judgments of this House delivered in the *Huxley* case, if they do not disregard it altogether, would appear to me to deprive it of all coercive authority. For these reasons I am of opinion that the appeal on the preliminary point fails and that the objection raised should be disallowed.

LORD SHAW OF DUNFERMLINE (read by LORD CARSON). My Lords, there is no question before your Lordships' House as to the merits of the action between these parties. It is admitted by both of them that these merits are finally disposed of and that the sole difference between them is as to costs.

I wish to make this general statement in the most absolute terms. A consideration of the decisions founded upon by learned counsel shows, first, that a question of costs which is incidental to a consideration of a judgment upon the merits may be entertained when but not unless the merits are brought before this House and made the subject of consideration.

In the second place, there may be cases figurably and indeed definitely alluded to in the judgment of this House, to which reference will presently be made, in which, even although the merits be brought formally upon appeal, yet the House may discern that that is but a colourable attempt to introduce costs, and nothing but costs, to their Lordships' consideration. Such an attempt being colourable stamps the case as one in which no merits are before this House; the remainder of the case being costs alone the appeal is thrown out on the simple ground that in substance costs, and nothing but costs, were brought before your Lordships. Such an appeal will not be entertained.

(1) [1906] W. N. 114.

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In these circumstances the respondent in this case makes an objection founded upon the practice. The first reason stated in his case is that the appeal ought to be dismissed, "because the present appeal is one brought as to costs only, and is therefore one which in accordance with the established principles of your Lordships' House cannot be sustained." The meaning of that I take to be that the appeal is excluded from consideration by the established practice. I think that reason to be sound, and I am of opinion that the appeal should accordingly be dismissed. The argument upon this subject contained a full reference to many authorities and was long and elaborate. It is clear to me that an attempt is now being made to subvert or invade in a most substantial sense our long settled practice.

The respondent was in the employ of a firm Donald Campbell & Co., and was the manager of their Eastern department. Their business was formed into a limited concern—namely, Donald Campbell & Co., Ld.—the respondent became director of that company and he was a large shareholder in it. It did not prosper, and in a short time went into liquidation. Acute differences ensued on the subject of the respondent's dealings, and, in particular, as to his relations with one Boris Said. The firm sued the respondent by a writ issued on May 31, 1921; then, a few days afterwards—namely, on June 3, 1921—the company issued a writ against him. The two actions were consolidated and tried before Darling J. and a jury, and resulted adversely to the respondent. The Court of Appeal ordered a new trial in both actions. On appeal to this House it was decided that there should be no new trial in the action by the firm and that a verdict in the firm's favour for 2943*l.* 2*s.* should stand. With regard to the company's action, however, which was an action for an account, it was decided that it should be retried.

It was retried, and confessedly the trial was most satisfactorily conducted. To use the language of Atkin L.J.: "That second action was tried before Branson J. It was tried before him for eight or ten days, and he gave a judgment as to issue on liability, and, if I may say so, a more satisfactory

judgment I have never read in a complicated case. It seems to me that the learned judge went very carefully into all the facts, considered very carefully the contentions of both parties, and, having very carefully considered and weighed them, eventually came to a decision in favour of Mr. Pollak. An action tried in that way should have the usual result that the parties are satisfied that justice has been done, although they do not go away satisfied with the result because it is very seldom possible to convince an unsuccessful plaintiff or defendant against his will. Nevertheless, both parties are obviously satisfied with the way in which the case has been tried, and there is no further appeal from the findings of the learned judge on the question of liability. The question that is before us now is the question as to costs. The learned judge has deprived Mr. Pollak of his costs."

My Lords, I do not propose to discuss whether Branson J. was right in so depriving Mr. Pollak of his costs, or whether the learned judges of the Court of Appeal were right in reversing that judgment and finding Mr. Pollak entitled to costs. In substance the Court of Appeal held that in exercising his discretion as to costs the learned judge had been moved towards that decision by facts established, or held to be established, when certain evidence was led in the previous consolidated action. The Court of Appeal held that he should not have been so influenced. The material was no doubt before him, in this sense, that the consolidated action and its procedure were referred to; but the Court of Appeal considered that Branson J. overstepped the legitimate limits by allowing the evidence to enter into or influence his mind and did not properly exercise his discretion. In these circumstances they confined within what they reckoned to be proper limits the true subject for consideration in the exercise of a discretion as to how costs should be awarded, and they did, in their turn, exercise a discretion as to costs, and made a pronouncement upon them in favour of Mr. Pollak. I shall, before I close, revert to this subject of discretion.

It would be improper to indicate which of these judgments was right, but this brief narrative has only been given in

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order to lead up to the fact now definitely manifest—namely, that from the day when Branson J. gave judgment in favour of the respondent, the merits of this action were not only finally determined but completely passed from. The judgment stands without suggestion by either side that it can be gone back upon, and with a confession that the appeal to this House is on costs alone. Neither in substance nor in form or colour are the merits brought before this House, and it is to that clear and clean case that the authorities as to practice have to be applied.

In *Fitzgibbon* v. *Scanlan* (1) Lord Chancellor Eldon said: "In regard to the matter of costs, although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters." That is a clear distinction between costs alone and other matters—namely, the merits. As to costs alone "an appeal would not be received." It is reported that Lord Redesdale concurred with the Lord Chancellor "in every particular." The case was decided in 1813.

The case of *Tod* v. *Tod* (2) completely confirms the same view as to practice, but it illustrates the matter from another aspect. A summons of reduction of a certain election of magistrates to a Royal Burgh in Scotland was raised in the Court of Session. The merits of the discussion need not be entered upon, but the Lord Chancellor said, upon the point of practice, as follows: "This House never does entertain an appeal for costs where costs are in the discretion of the Court below." That is a statement of the general practice. He then, however, added: "But when the Legislature, by a statute, has expressly required that the Court of Session, in the case of an action that is brought under the authority of that statute, and in the case of a summary complaint which is brought under that statute, the Court shall make the party who fails pay the full costs of suit, it does appear to me that the party is in fact entitled to full costs of suit, and that being so entitled to full costs

(1) 1 Dow, 261, 270. (2) 2 W. & S. 542, 549.

of suit, the Court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute." And the Lord Chancellor concludes with this clear pronouncement: "If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie."

In 1835 occurred the case of *Inglis* v. *Mansfield* (1), a case on appeal to this House from the Court of Session. Lord Brougham L.C. put the matter thus: "The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits; and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised." It appears to me, confining the decision to the practice of this House, that that judgment makes clear the distinction in our practice that costs alone you cannot appeal for: they will only be considered by this House when merits are brought up for consideration, and they will not even then be so considered if the bringing up of the merits is a colourable device for getting costs considered. I am humbly of opinion that all this is still law.

Home v. *Pringle* (2) was decided in 1841. Lord Cottenham L.C. dealt with the question of costs on the same lines. He said: "If I had been sitting in the Court below, considering the failure of the case made against the trustees, and the unjustifiable charges brought against them, I should perhaps have thought it just that they should be indemnified in costs, by directing the pursuer to pay them. But in this House the case is different. A Court of Appeal does not interfere in the question of costs without reluctance in any case, and generally will not entertain an appeal for costs alone." And the House decided accordingly.

(1) 3 Cl. & F. 362, 371. (2) 8 Cl. & F. 264, 293.

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Although I am citing the authorities presented to the House in their order, it seems clear to my mind that the general practice of the House was a practice not begun with those cases, but that the dicta of these three Lords Chancellors confirmed a rule well established and of long standing. It is so treated in Mr. Macqueen's work on the Practice of the House of Lords and Privy Council. An appeal, says he, will not lie on costs alone, but it does not follow that the article of costs may not be taken into consideration when there is an appeal respecting other matters, and then he quotes Lord Brougham's judgment already cited.

In *Wilson* v. *The Queen* (1) an appeal had been presented to the Judicial Committee of the Privy Council from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the Customs laws. One of the appellants was proved not to be the owner of the goods, though so proceeded against. He, however, was cast in costs by the Court below. He made no appeal on the merits, the decision being in his favour. He, however, did appeal, and Lord Cairns L.J. then said: "With regard to one of the appellants, Cole, it was attempted to maintain his right to appeal, on the ground that, although he had been absolved from penalties in the Court below, he had not been awarded the costs of the proceeding against him. Their Lordships are of opinion that, with regard to the appellant, Cole, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule, that an appeal for costs could not be entertained."

The rule thus enunciated by Lord Chancellors of the greatest eminence and covering a period of practice of over half a century is, however, argued to have been either changed or evaded by *Yeo* v. *Tatem* (2), decided in 1871. It was a case of damage instituted on behalf of the owners of a brigantine *Georgiana* against the brig *Orient* and her owners, the appellants being, as was assumed, their agents. A general denial was pleaded in answer, and a special defence was put in that the damage complained of had been already

(1) L. R. 1 P. C. 405, 408. (2) L. R. 3 P. C. 696, 702.

adjudicated upon in a Court of law and judgment obtained and satisfied. At the hearing it was proved by a witness who was the principal defendant that the damage was occasioned by acts done by him on his own responsibility, but claiming certain rights as consignee. The Admiralty judge held that the suit could not be maintained, but declined to give the defendants their costs or go into this special defence, although his judgment was asked thereon by the defendants' counsel. It was held by the Judicial Committee that the defendants were entitled to have the judgment of the Court as asked on the special defence, that the general traverse and denial was sufficient to justify the evidence, and that the appeal was not for costs alone.

It is plain that the merits of the case, and not costs alone, were thus brought before the Privy Council, and it is also clear that the Council so thought. A perusal of the judgment of Sir Joseph Napier demonstrates this. In the course of his opinion, however, he said this: "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of principles of law—the party prejudiced is entitled to have the benefit of correction by appeal."

My Lords, I am of opinion that the argument ably submitted in the present case to this House misconstrues these words here employed—namely, "mistake upon some matter of law that governs or affects costs." It seems plain to me that that refers to a matter of law on the merits of the case: it does not refer to a decision upon costs or a matter of law about costs, but it refers to a matter of law upon the merits of the case consequent upon which decision on merits the question of costs could hang. That there was such a decision on the merits given in *Yeo's* case (1) is plain, and a most important decision as to practice it was—namely, as to whether the general traverse and denial was sufficient to justify certain evidence produced: a substantial question

(1) L. R. 3 P. C. 696.

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on the merits equivalent to a plea of res judicata had to be decided. Merits accordingly being thus brought before the Judicial Committee, any question as to "costs alone" disappears. And it is to be noted that "Their Lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs."

It is argued that in the case of *Metropolitan Asylum District Managers* v. *Hill* (1) observations fell from the Court which essentially weakened the long established rule of practice so frequently affirmed. I am humbly of opinion that this is not so. Upon the contrary, the rule was reaffirmed that an appeal must not be brought for costs or in relation to costs, "but an appeal against an order which imposes, as a condition to having a new trial, the payment, within a certain time, of the costs of the first trial does not fall within that principle." As Lord Selborne L.C. put it: "The Court of Appeal conditionally discharged the order for the new trial, and in the alternative conditionally dismissed the appeal." It seems clear, accordingly, that the point before the House was whether the appellants "were entitled to retain the order which they had obtained from the Court of first instance, unclogged and unfettered by conditions." Lord Blackburn makes the distinction very emphatically when he says: "Your Lordships may possibly come to the conclusion that there ought to be a new trial absolute and simple, without any condition at all, or it may be that you will think it right for there to be a new trial with the condition which the Queen's Bench Division imposed, or with the condition which the Court of Appeal imposed, or it may possibly be that you will be of opinion that there should be a new trial with some other condition different from either." Lord Watson expressly concedes "the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but," he adds, "it appears to me that that rule is limited to the case where the whole merits of the action of cause have been

(1) 5 App. Cas. 582, 584, 586.

determined." Instead, accordingly, of *Hill's* case casting doubt upon the rule, it follows it and confirms it, and, as appears from the language of Lord Watson just cited, applies it almost expressly to the present case now before the House, which is cited to be a case "where the whole merits of the action or cause have been determined."

In 1889 occurred the case of *Huxley* v. *West London Extension Ry. Co.* (1) The case did not deal with the question now before your Lordships' House, but with the construction of a certain passage in Order LXV., r. 1, of the Rules of the Supreme Court, 1883, which applies to the discretion exercised by the judge or court in trials with a jury, the prescription of the rule being that in such cases "the costs shall follow the event unless the judge . . . . or the court shall for good cause otherwise order."

The judge trying the cause with a jury had refused to exercise his discretion or exercise any jurisdiction in the matter. The Court of Appeal sent it back to him, and he deprived the plaintiff of costs for the causes set out in his report. The questions before this House truly were whether the Lord Chief Justice by at first declining to determine costs had rendered himself functus officio, and what in practice and on merits was important—namely, what were the true procedure under, and the true construction of, the Statutory Order. The case does not appear to me to throw any light upon the point of practice before your Lordships.

It is different, however, with the case of *Caledonian Ry. Co.* v. *Barrie.* (2) The pure and broad question was there brought before a powerful committee of this House, consisting of Lords Macnaghten, Shand, Davey, Robertson and Lindley. It was an appeal against a judgment of the Court of Session in Scotland in an action directed against the railway company for injury to cattle being conveyed under a certain contract. The Sheriff Substitute assoilsied the company, but gave them no costs. On an appeal to the Sheriff he cast the company in the costs of the case. It appeared that the company's behaviour was considered reprehensible; it

(1) 14 App. Cas. 26. (2) [1903] A. C. 126.

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had denied to the cattle dealer any information as to the cause of the injury to the stock and had declined to allow any railway servant to be precognosced.

The First Division of the Court of Session by a majority affirmed the Sheriff. Lord Adam said that the case raised "a question of principle" depending on the construction and meaning of the correspondence between the parties and their actings. The Court accordingly applied their minds to the correspondence, etc., and held that the Sheriff was right. Lord McLaren dissented, holding that he was wrong. If there ever was a pure question of costs on which the House of Lords could have been induced to entertain the appeal, this was one. The successful party had been cast in the costs of the unsuccessful party. One judge of Appeal had dissented and the other judge had admitted that he decided the case upon principle. The Appeal Committee before whom the case was argued and decisions cited held as follows: "That the appeal being on the question of costs only was incompetent."

In *Rieken* v. *Yorke Peninsula Justices* (1) another attempt was made in the Privy Council to get the better of the rule. The judgment of their Lordships was delivered by Lord Collins, who cited *Wilson* v. *The Queen* (2); *Inglis* v. *Mansfield* (3); and *Yeo* v. *Tatem* (4), and held that the rule was firmly established.

I have thus, my Lords, gone through all the relevant and important cases founded upon. They cover a period of over 100 years. They appear to me to culminate in *Caledonian Ry. Co.* v. *Barrie.* (5) It appears to me to be settled by authority that this appeal, admittedly in no respect upon the merits of the cause but solely upon costs, must be rejected as incompetent. It falls within no exception to which a statute applies. When an Act of Parliament or a Statutory Order or a recognized rule of law has prescribed that in a certain event there must be a certain result as to costs, then

(1) [1908] A. C. 454.
(2) L. R. 1 P. C. 405.
(3) 3 Cl. & F. 362.
(4) L. R. 3 P. C. 696.
(5) [1903] A. C. 126.

the Courts must follow that prescription, but this becomes part of the merits of the case itself. There is no such case here.

The exercise of discretion is a wide term. Suppose a decision demonstrably and confessedly resting upon elements derived illegitimately and improperly from material only imported into the case on account of some invidia in the judge's mind, and not resting upon material in the cause, it may be that in such a case this House might think fit to break down or make that an exception to the rule. I do not suggest that the House would be foreclosed from doing so, although it stands to reason that such an invasion of practice would require to be founded upon extraordinarily strong grounds.

But I see nothing in the present case to give a right to an appeal to this House on the challenge that it was a legal matter for the House to determine as to what were the materials on which the judge who tried the case should have exercised his discretion. These materials were admittedly to be found within the four corners of the consolidated cases by the company and the firm. The case, in short, is the familiar one of a discretion being alleged to have been wrongly exercised by a judge: the phrase used is that he misdirected himself, the equivalent of which is simply that he went wrong. If he took something into account which had entered into the case actually or by inference, but which he should not have allowed to enter his mind, and should have been blind to, then his discretion might have been erroneously exercised, and the Court of Appeal according to its practice was of course within its rights in correcting this error and exercising its own discretion without allowing such an error to creep in.

But, my Lords, the practice of the House appears to me to be plain, that at that stage finality upon costs with all the points as to the elements of discretion applicable thereto —finality is definitely reached. The Court of Appeal in England and either Division of Court of Session in Scotland are charged with that final responsibility. This House

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respects that finality, as does the Judicial Committee of the Privy Council, in regard to decrees upon costs alone pronounced by Indian and Colonial judicatories.

I desire to add this, my Lords: I think, but of course I cannot testify especially, upon the practice in England. But with regard to Scotland I can. I feel sure that legal practitioners and litigants in that country have looked upon the rule as so settled and have accepted that finality of their Supreme Court accordingly. I do not doubt that the same thing has happened in England. Your Lordships are thus confronted with an appeal made not only to upset a course of decision, which has extended for over a century, but with a uniform practice of the two laws and countries in conformity therewith. I think that practice was right and that this case falls within it.

My Lords, I will add but one word, as to the argument submitted to this House in regard to the Appellate Jurisdiction Act. Sect. 3 of that statute is as follows: "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following, that is to say: (1.) Of Her Majesty's Court of Appeal in England." It was argued in the present case, as it was in *Secretary of State for Home Affairs* v. *O'Brien* (1), that this language is language of complete generality. It was held in the case cited that such language could not and was never meant to apply in the sense of extending the jurisdiction or practice of this House so as to make appealable an order of liberation pronounced upon a writ of habeas corpus, the practice of this House having been to respect the principle that once liberation had been granted by any Court the cause is at an end.

I do not think that the enumeration in general terms as to all orders of the Court of Appeal was made to, or does, apply to a complete inversion of the practice of this House not to entertain appeals solely upon costs. The long settled practice to which I have referred could only have been inverted or invaded by language directly and

(1) [1923] A. C. 603.

distinctly aimed and settled for that purpose. The principles set forth in *O'Brien's* case (1) and in *Cox* v. *Hakes* (2) appear to me to cover the present case.

I am humbly of opinion that the objection by the respondent to the competency of the present appeal is well founded, and that it should be sustained and the appeal dismissed with costs.

My Lords, the above was the opinion which I formed at the close of the first hearing. I have most carefully and respectfully considered the very able arguments of counsel at the second hearing and the views of your Lordships just delivered, and I adhere to my first opinion. In doing so the House will forgive me, I trust, while I merely note these supplementary points.

1. This is a purely English appeal and, in my view, can form no precedent in regard to Scotch appeals. Its decision turns out to be governed by the effect of Order LXV. of the Rules of the English Supreme Court and of the position and practice of the Court of Appeal under the English Judicature Act. It appears to be accepted that the Court of Appeal may rectify an error in law which it is satisfied the first judge fell into, but that it itself exercises no discretion. In case of the present decision of this House ever being cited in any Scotch attempt at appeal from the Court of Session not on merits but upon costs alone, I think it right only to mention that in Scotland there is, neither by enactment nor practice nor analogy, any justification for holding that the long standing practice with regard to Scotch appeals is now being invaded or altered. The Inner House of the Court of Session has itself a discretion as to the award, modification or refusal of costs. Quoad an appeal to the House of Lords, if a decision upon costs has been reached by the Inner House that decision cannot, solely on costs, be challenged in this House, and must stand as final. The matter has been so treated by writers on practice, such as the learned Professor Eneas Mackay. And its clear and absolute character has, I can personally testify, been so treated during the more than half a century of my own professional life.

(1) [1923] A. C. 603. (2) (1890) 15 App. Cas. 506.

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2. I venture to enter my special dissent from those opinions which have expressed either doubt or question of the decision of the powerful appeal committee which sat in *Caledonian Ry. Co.* v. *Barrie.* (1) It is true that in the argument a reference was made to another question—namely, the effect of s. 40 of the Scotch Judicature Act (which confines the range of facts to those found in the Court below). But that reference was an irrelevant and futile reference and had no bearing on the question of the competency of the appeal. The true question—namely, "Is there an appeal to the House of Lords on a question of costs alone?"—that question, as the private records of the case show, was thoroughly argued and the whole catalogue of leading cases already alluded to was cited; and when Lord Macnaghten in throwing out the appeal did so, he referred to the ground for doing so as one; and nobody can doubt that it was and was alone the one which is before your Lordships now.

3. I venture to call attention to what happened in the Court of Appeal on the form of that Court's judgment. It is as follows—namely, that such part of Branson J.'s judgment "as orders that no order be made as to costs be set aside and that judgment be entered for the defendant Raymond Pollak with costs."

My Lords, there is no record, and it is, I understand, not the fact, that any objection whatsoever was made by either party to the Court of Appeal itself deciding the question of costs. If their judgment was taken as merely a correction of an error or self-misdirection, the legal course was to send the case back to Branson J. to eliminate that error and apply his discretion correctly to the case and make such a judgment on the whole case—without that error—as should seem right.

Why was this not done? It appears to me to be fairly clear that the reason was that it was accepted by both parties that the Court of Appeal should be allowed to arrange costs according to its discretion, that is to say, its idea of what a discretion on a review of the whole case should have come

(1) [1903] A. C. 126.

to. The astonishing fact remains that neither party in the case—by the reasons formulated in his appeal—has taken any point of objection to the decision of the Court of Appeal on costs standing pro forma as it does. The argument presented to your Lordships is rather of the nature of an astute afterthought unsupported by either reason or suggestion upon the papers. I do not enter further upon the topic lest I should trench upon the merits.

4. On the general rule which excludes from this House appeals on costs alone, the invasion of that rule has, in my opinion, in the past been only allowed by reason of something like a statutory or other prescription—as already referred to—which arises ab extra, and so compels by force of law the exception. But the case of the present appeal does not arise from a prescription ab extra; it is founded on something psychological, discoverable by an analysis of what is alleged to have operated in the minds of the judges who settled the costs. It is here that I part company with those who invoke the suggestion of a failure of substantial justice. The cases are legion in which, even while assenting to the merits of the judgment, one or other or both of the parties think that substantial justice has not been done upon costs. And if the rule against excluding such questions from that salutary finality which has for generations made them find an end in the lower Courts—if that rule be either invaded or abrogated, then the way may possibly have been opened to powerful litigants for the perpetration of much duress and injustice by, it may be, the ruinous protraction of litigation.

LORD BLANESBURGH (read by VISCOUNT DUNEDIN). My Lords, Turner L.J., when delivering the judgment of the Judicial Committee in *Attenborough* v. *Kemp* (1), deals with appeals upon costs alone in terms which may usefully be recalled. His observations are invariably referred to as the basis of the rule on this subject which, as elucidated in subsequent decisions, obtains with the Board.

(1) 14 Moo. P. C. 351, 353.

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Their Lordships, said the Lord Justice, "do not wish to lay it down as a general rule, that in no case would there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the Court below has proceeded upon mistake or misapprehension. Their Lordships do not think that any general rule can be laid down which must apply to cases of this description. Such cases their Lordships desire to leave untouched; but where there has been bona fide care and discretion exercised on the part of the judge who has decided the case, their Lordships have no hesitation in stating their opinion to be, that in such a case no appeal will lie in respect of costs alone."

I may, at a later stage, have to refer to this passage in its entirety. At the moment I am concerned only with its last sentence. Upon that, I hazard the observation that in your Lordships' House also, the rule at least to the extent there stated is equally well established. And with a rule so limited, I know of no interference, legislative or other, which is, or ever has been, threatened from any quarter.

How far further, if at all, the rule in this House extends or should be permitted to extend: at what point an appeal which may superficially retain the appearance of an appeal as to costs alone ceases under these words to be correctly so described in any sense relevant to its competence: at what point an appeal within the meaning of any rational rule on the subject ceases to be an appeal as to costs alone and becomes something quite different: at what stage it ceases in the same sense to be an appeal as to costs at all—these are the questions, and the only questions, upon which in a case like the present there is room for difference of opinion.

There emerges, however, on this appeal, largely as the result of the conjoint effect of two decisions of this House, *Huxley* v. *West London Extension Ry. Co.* (1) and *Secretary of State for Home Affairs* v. *O'Brien* (2), a separate question of perhaps equal importance. We are here concerned with an appeal from an order of the Court of Appeal in England.

(1) 14 App. Cas. 26. (2) [1923] A. C. 603.

It is presented to your Lordships' House under and by virtue of s. 3 of the Appellate Jurisdiction Act, 1876. The appeal quite clearly comes within the words of that section, and the separate question here is whether the appellants are not under its unqualified provisions entitled at your Lordships' hand to a hearing of their appeal whatever may be the true limits of any rule of the House applicable to appeals, not within the section.

It will, my Lords, be a convenient introduction to the consideration of all these questions if an attempt be made in the first instance to determine with precision exactly what this appeal is and what it is not, and incidentally to ascertain what the jurisdiction was which the Court of Appeal professedly exercised in making the order now appealed from and how it deemed itself to be possessed of that jurisdiction. Whether there is or is not a duty laid upon your Lordships' House to entertain this appeal will, I believe, largely turn on the position as made apparent by that preliminary inquiry.

My Lords, after deciding the case in favour of the defendant, Branson J., who tried the action without a jury, gave judgment for him, but, as the formal order expresses it, he made no order as to costs. In the circumstances, these words were superfluous. The operation of the learned judge's order would have been the same had the order been silent as to costs. Its result, intended and effective, however, was that the costs did not follow the event for the reason that the learned judge, purporting to exercise his judicial discretion in the matter, decided that they should not.

He explains his decision and the reasoning which led him to it in terms which do not admit of misunderstanding. But for one circumstance the defendant was entitled to his costs of action, as in ordinary course. But for that circumstance he would have exercised his discretion by ordering the plaintiffs to pay these costs. The plaintiffs, however had called his attention to certain things touching the conduct of the defendant in an action at one time consolidated with this action, but to which the plaintiffs

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were not parties: to these circumstances, which he accepted as having been proved before him, the learned judge held that he was in law entitled to have regard in dealing with costs: and taking them into account, and them alone, he exercised his discretion by making no order as to costs at all, with the result that the defendant was thereby deprived of a very large sum to which it is quite clear the learned judge would otherwise have considered him entitled. It is true that that large sum was costs. But that, so far as the principle of the thing is concerned, is the merest accident. The legal question whether the learned judge was justified in taking into account the circumstances which he did, might, in another case, just as easily arise with reference to a right to any kind of property made dependent upon the exercise of a judicial discretion.

In relation to costs the learned judge's powers are derived from Order LXV., r. 1. That order, so far as material, is in the terms following: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order."

My Lords, the action, as I have said, was not tried with a jury, and your Lordships have present to your minds the difference which exists under that rule in the matter of costs between an action tried with a jury and one, like the present, tried by a judge alone. In the case of the first, the costs follow the event, unless "for good cause" it is otherwise ordered. In the case of the second, the costs all through

are in the discretion of the judge, and the successful party, whether plaintiff or defendant, gets no costs unless the judge awards them. But while that is the distinction there is in circumstances like the present little practical difference between the two. Had this action been tried with a jury and had the jury's verdict been for the defendant, the learned judge would have found, in the circumstances to which I have already alluded, the presence of the "good cause," which would have enabled him in his discretion to "otherwise order." And his order, then discretionary, would as now, have said that there was to be no order as to costs. The result and the mental process by which it was judicially reached would have been the same in that case and in this. I desire, my Lords, particularly to emphasize this statement, and for the reason that had the learned judge's order as to costs here followed the verdict of a jury instead of, as it did, a judgment of his own, the question whether in law he was entitled to make the order would without doubt have been open to final review in this House. Such is the result of *Huxley* v. *West London Extension Ry. Co.* (1) In my eyes, it is not the least of the respondent's difficulties in this preliminary discussion that he is confronted with the problem, which I have myself found insoluble, of stating, as he must, your Lordships' rule as to appeals for costs alone in some rational form under which the "good cause" cases will be taken and appeals like the present will be left.

From the learned judge's order, so far as it deprived him of costs, the defendant appealed to the Court of Appeal, and it is now essential to see exactly what the objection was which he there took to the order made by the learned judge. On its nature any competence that court had to entertain the appeal turned. And, first of all, the objection was not concerned with the manner in which the learned judge had exercised his discretion. It has never been denied in these proceedings that the actual exercise

(1) 14 App. Cas. 26.

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of a proper discretion in relation to costs remained in this case a matter for the learned judge and for no one else. Sect. 49 of the Judicature Act, 1873, which is the governing section, provided "that no order made by the High Court of Justice . . . . as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court . . . . making such order." Such leave in the present case was never either asked for or given. And, the object of the section being that except with such consent the Court of Appeal shall not review a judge's discretion with reference to costs : *Bew* v. *Bew* (1), it follows that in the present case any such review was entirely beyond the competence of the Court of Appeal. Nor did that Court undertake any task of the kind. How, indeed, could it have, when the merits or otherwise of the defendant's conduct in relation to the litigation were never before it ? The order of the Court of Appeal took the form it does, only, I feel sure, because the learned judge had in effect intimated how he himself would have dealt with the costs if the circumstances to which he had had regard were not open to his consideration. But for that intimation the Court of Appeal would have been bound to refer the case back to the learned judge for him to exercise his discretion afresh on a consideration of the materials to which in the view of that Court he was confined. In the circumstances that would have been a needless formality. The order accordingly gave to the defendant his costs at once. But in so giving them there was no exercise by the Court of Appeal of a discretion of its own. Sure it is that this appeal, whatever else may be said of it, is not, in any sense, an appeal from the exercise by the Court of Appeal of any discretion at all. It is not, I submit, open to your Lordships to refuse to entertain it for any such non-existent reason.

And the point is of first importance. On that very ground the present case is at once distinguished in principle from many which have been referred to, and notably from one on which great reliance was placed by Mr. Jowitt—I mean *Caledonian*

(1) [1899] 2 Ch. 467, 471.

Ry. Co. v. *Barrie.* (1) There the learned Sheriff-Substitute had exercised his discretion as to costs on the facts which were all before him. On appeal, the Sheriff-Principal first, and the Inner House in turn, exercised on their view of the same facts, but in another way, what they treated as being, and what was apparently on all hands accepted as being, their own discretion. There was then an appeal to this House, and if its rejection by the appeal committee was in fact based on the ground that it was an appeal from the exercise of that last discretion one can feel no surprise at the result. For *Barrie's* case (1) is only another illustration of the Privy Council rule, as above expounded by Turner L.J.: an illustration of the rule of this House as accepted in every quarter.

Very different was the case here raised in the Court of Appeal and decided by that Court. It was that the learned judge, bound by law to deal with the costs of the action in the exercise of a judicial discretion, had, so far from doing so, avowedly based his order upon circumstances which in the submission of the defendant were not before him and to which in law he was not entitled to have any regard at all; that, in other words, on the learned judge's own avowal, the only discretion he had exercised was no discretion whatever.

And that contention of the defendant he, in accordance with existing authorities binding upon the Court of Appeal, was entitled to raise by appeal. "No doubt," says Lord Halsbury in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2), "where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion

(1) [1903] A. C. 126. (2) [1903] 2 K. B. 756, 765.

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at all. . . . . That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs."

The deprivation of a party of his costs, if upon a ground not warranted in law, is a determination of the judge in point of law: see per Phillimore J., *Westgate* v. *Crowe*. (1) Accordingly, the order of Branson J. as to costs, objected to, as it was, on the ground stated by Lord Halsbury in the judgment just cited, became an appealable order under s. 19 of the Judicature Act, 1873, just as for a reason completely analogous is appealable under the same section the question, whether there exists in law "good cause" enabling a judge after verdict of a jury and in the exercise of his discretion to order that the costs shall not follow the event, but shall be dealt with in some other way.

Thus is brought to view the exact question which your Lordships on this preliminary point have first to decide. Is there any existent rule of this House as to appeals for costs alone, be its terms what you will, which is effective to stop in limine this particular appeal of the appellants from this order of the Court of Appeal made by that Court in the circumstances and on the grounds stated?

Now excluding as I do from consideration any possible suggestion that the appeal is an abuse of your Lordships' procedure—no one in the circumstances of this case has made or could have made such a suggestion—I venture to assert in answer that for two reasons quite independent of each other, there can be no such rule.

First, this appeal is in this matter of costs indistinguishable in principle from the appeal as to the presence of "good cause" which was entertained and decided by the House

(1) [1908] 1 K. B. 24, 27.

in *Huxley* v. *West London Extension Ry. Co.* (1) In such cases, as had been observed by Brett M.R. in *Jones* v. *Curling* (2), the Court [of Appeal] is bound to inquire whether the condition exists which gives a judge jurisdiction to make an order as to costs. In *Huxley's* case (1) this House entered upon the same inquiry—its reason for doing so being, I think, correctly expressed in the headnote in the words, "that if the Court or judge give effect to considerations which do not constitute 'good cause' within the meaning of the rule, they exceed the limits of their jurisdiction; and on that ground their decisions are not protected from review." Equally so, here, my Lords. The question is, and is only, whether the learned judge did or did not for an analogous reason exceed his jurisdiction. As Lord Blackburn observed in *Metropolitan Asylum District Managers* v. *Hill* (3), "it is not because the condition involves the payment of costs, that, therefore, the question whether there is to be a condition or not, is to be considered a mere dispute about costs." The real question here raised is only accidentally concerned with costs.

But, my Lords, there is another reason which leads to the same result. It is that, if the Court of Appeal was bound to entertain the defendant's appeal, so under s. 3 of the Appellate Jurisdiction Act, 1896, the House has the statutory duty imposed upon it of hearing this appeal. In my judgment that conclusion results from the decision in *Secretary of State for Home Affairs* v. *O'Brien* (4) as embodied for this purpose in the following passage from Lord Dunedin's judgment: "The generality of expression of a clause which gives an appeal . . . . to the Court of Appeal is indistinguishable from the generality of the clause which gives an appeal from the Court of Appeal to this House. It follows that the considerations urged in the case of *Cox* v. *Hakes* (5), which case decided that appeal was not competent, are equally applicable when the question is whether appeal in

(1) 14 App. Cas. 26.
(2) 13 Q. B. D. 262, 267.
(3) 5 App. Cas. 582, 586.
(4) [1923] A. C. 603, 620.
(5) 15 App. Cas. 506.

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such a case as the present lies from the Court of Appeal to this House."

My Lords, the converse here is the case. By common consent so far, for Mr. Bevan did not dispute and Mr. Jowitt in terms adhered to that position in his reply, an appeal in this case did lie to the Court of Appeal under s. 19 of the Judicature Act, 1873. By s. 3 of the Appellate Jurisdiction Act, 1876—a clause of equal generality—an appeal is given to this House. Why then does no appeal lie in this case ? The only answer I have heard made is that just as in *O'Brien's* case (1), the words, although wide enough to cover an appeal from an order for the issue of a writ of habeas corpus, could not have been intended to include such an appeal, so here the words of s. 3 must be read so as to exclude the competence of an appeal which impinges upon your Lordships' rule against hearing an appeal for costs alone.

My Lords, I cannot think that *O'Brien's* case (1) can be invoked to support that answer. I cannot think that the exception there introduced, on the high ground that if it were not, the section would have retraced what had been " the evolutionary development of the constitutional liberty of the subject "—a backward step which a majority of your Lordships were satisfied Parliament had no intention of taking—can justify a similar exception in favour of a mere rule of procedure so undefined in its scope that it offered no hindrance to the free discussion in this House of *Huxley* v. *West London Extension Ry. Co.* (2), an appeal on the present footing indistinguishable in principle from this, as I hope I have shown.

On this ground also, my Lords, I am of opinion that this preliminary point should be determined in the appellant's favour.

In reaching this conclusion I have proceeded on the assumption made, as above appears, by counsel on both sides that the authorities which required the Court of Appeal to hear the appeal from the learned judge's order as to costs

(1) [1923] A. C. 603. (2) 14 App. Cas. 26.

would not now be reviewed. And, as I apprehend, it is only on that assumption that this preliminary point presents any difficulty at all. For, if in truth the Court of Appeal had no right of interference in this case: if the jurisdiction which it purported to exercise was a usurped jurisdiction, then the duty of this House to restore the parties to their original position, if called upon to do so, would be clear. On that view of the matter the House would, as it has always done, merely be interfering with an order as to costs alone where the Court below had no jurisdiction over them.

I come now to the question of the actual ambit of the rule. On that I have little to say. I have had the advantage of reading in print the judgment of the Lord Chancellor, and with that judgment upon this matter I am in entire agreement. I would venture upon it to add only these observations of my own.

First. The rule has never been described as one peculiar to your Lordships' House. Lord Brougham, in his statement of it in *Inglis* v. *Mansfield* (1), says it is common to this House, the Privy Council and the Court of Chancery. The Lord Chancellor has, I think, clearly shown that to extend it beyond the limit which he himself sets for it would carry the rule in this House beyond that of the Privy Council, the Court of Appeal in Chancery or the Court of Appeal as now constituted. His review of the authorities, I think, also establishes that this appeal would to-day be cognizable in the Privy Council, and it was, of course, entertained, from the respondent's point of view, by the Court of Appeal. No case, since the passing of the Judicature Act, has disclosed the existence in this House of any rule which would make it incompetent here. *Huxley* v. *West London Extension Ry. Co.* (2), and less pointedly *Metropolitan Asylum District Managers* v. *Hill* (3), show that no such rule was then operative. These cases, on the one hand, with *Caledonian Ry. Co.* v. *Barrie* (4) as reported, on the other, prove to my mind that the existing rule in this House is really in accord with the

(1) 3 Cl. & F. 362, 371.
(2) 14 App. Cas. 26.
(3) 5 App. Cas. 582.
(4) [1903] A. C. 126.

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statement of the Privy Council rule as contained or implied in the words of Turner L.J. with which I commenced this judgment. Since *Barrie's* case (1) the question has apparently not been raised in this House, and from that fact and from the further fact that no attempt was made in such cases as *Jones* v. *Curling* (2), and the *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3), to test in this House the decisions of the Court of Appeal, it has been suggested that since *Barrie's* case (1) the sense of the profession has been that the avenue to this House has been closed. But, if so, the profession misunderstood *Barrie's* case (1), and, further *Jones* v. *Curling* (2) was a "good cause" case. The *Civil Service Society's* case (3), as the extract from Lord Halsbury's judgment in it above cited shows, was like the present. And truly there was no further appeal in either. But whatever may have been the reason for that omission in the *Society's* case—poor prospects seem a sufficient explanation—your Lordships' rule ought to have had nothing to do with the absence of an appeal in *Jones* v. *Curling* (2), for as *Huxley* v. *West London Extension Ry. Co.* (4) subsequently showed, the rule would have imposed no barrier whatever to the appellant's progress to this House.

Secondly. The wider statement of the rule would seem to exclude from your Lordships' competence an appeal for his costs either by a trustee or mortgagee: and some colour for the suggestion that these costs are to be regarded like any other costs is to be found in the judgment of Lord Cottenham in *Home* v. *Pringle.* (5) Mr. Jowitt, if I recollect aright, in his opening argument on the first discussion of this preliminary point contended that such costs were within the supposed rule. Most certainly no statement of the rule brought to your Lordships' notice has in terms excluded them. But no mere rule of practice could ever be supposed to go so far as to embrace within its operation questions touching the

(1) [1903] A. C. 126.
(2) 13 Q. B. D. 262.
(3) [1903] 2 K. B. 756.
(4) 14 App. Cas. 26.
(5) 8 Cl. & F. 264, 293.

contractual right of trustees and mortgagees to their costs, and I can hardly suppose that any of your Lordships would desire to lay down or support a rule for this House which would deprive either a trustee or mortgagee of the privilege of having enforced here, if they have been denied elsewhere, his rights in this matter, as defined once for all by Lord Selborne in *Cotterell* v. *Stratton* (1), and by Sir George Jessel M.R. in *Turner* v. *Hancock*. (2)

But how eloquent upon the extreme vagueness of the rule, if carried beyond its admitted purview, is this necessary but hitherto entirely unexpressed exception to it!

Thirdly. It is suggested that the rule of this House on this subject may properly be more strict than the rule either of the Court of Appeal or of the Privy Council, inasmuch as an appeal to your Lordships is always at least a third hearing. To my mind, this suggestion would be more convincing if the rule were applicable only where the findings below had been concurrent. But there is no such limitation upon its operation, as is shown by the views of those who justify its application to the present case.

Fourthly. The rule as defined by the Lord Chancellor protects the House from every mischief in relation to appeals for costs alone, against which the House needs protection. Any extension of the rule beyond that point can, I suggest, only be justified by clear and irresistible authority, for it is surely highly inexpedient that except to that extent the right to receive or the liability to pay costs representing frequently, as in this case, very large sums should be placed beyond your Lordships' cognizance not by statute but by your Lordships' own act.

In the result, I am of opinion that this preliminary objection from whatever angle it be regarded should not be sustained, and I concur in the motion which the Lord Chancellor has made.

The hearing of the appeal on the merits was adjourned.

(1) (1872) L. R. 8 Ch. 295, 302. (2) (1882) 20 Ch. D. 303, 305.

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The arguments upon the hearing of the appeal sufficiently appear from the judgments.

1927. May 13, 19, 20, 24. *Stuart Bevan K.C.* and *Barrington-Ward K.C.* (with them *E. F. Spence K.C.*) for the appellants.

Jowitt K.C. and *Astell Burt* for the respondent.

The House took time for consideration.

1927. July 29. VISCOUNT CAVE L.C. My Lords, the preliminary objection to this appeal having been overruled your Lordships are now called upon to dispose of the appeal. In expressing my opinion on the preliminary question I have sufficiently stated the facts; and for the present purpose it is enough to remind your Lordships that Branson J., who tried this action without a jury, gave judgment for the defendant (the present respondent) without costs; and that on an appeal by the defendant, without the leave of the judge, against so much of the judgment as related to costs, the Court of Appeal set aside the judgment of the trial judge and directed that judgment be entered for the defendant with costs. The question to be determined is whether the order of the Court of Appeal was right.

In order that this question may be answered, it is necessary to consider first the nature and extent of the jurisdiction of the Court of Appeal to review an order of the first Court as to costs. It is true that no question of jurisdiction was raised in the appellants' case on this appeal; but the jurisdiction of a Court does not depend on the pleadings or admissions of the parties to a suit, and, however such a question may emerge, it is (I think) impossible for this House to pass it by and to give its decision on the basis of the existence of a jurisdiction which may or may not have been conferred. I propose, therefore, first to deal with this question.

The jurisdiction of the Court of Appeal to review an order of the trial Court as to costs depends on statutes and on rules of Court which have the force of a statute; and the

enactments which were in force when the judgment in question was given were s. 49 of the Judicature Act, 1873 (now represented by s. 31, sub-s. 1 (*h*), of the Judicature Act, 1925), s. 5 of the Judicature Act, 1890, and Order LXV., r. 1, of the Rules of the Supreme Court. The terms of these provisions are as follows :—

Judicature Act, 1873, s. 49.—"No order made by the High Court of Justice or any judge thereof, by the consent of the parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

Judicature Act, 1890, s. 5.—"Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Rules of the Supreme Court, Order LXV., r. 1.—"Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

My Lords, at first sight these enactments would appear expressly to deprive the Court of Appeal of any jurisdiction

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to make the order now under appeal. Sect. 5 of the Act of 1890 provides that, subject to the Judicature Acts and rules of Court, the costs of all proceedings in the Supreme Court are to be in the discretion of the Court or judge. Rule 1 of Order LXV. repeats this enactment, but provides that in the case of a trial with a jury the costs shall follow the event unless the Court shall for good cause otherwise order; and the effect of this exception in the case of trial with a jury is to confirm and strengthen the absolute discretion which in an action tried without a jury is conferred upon the Court. It follows that in a non-jury case the costs are "by law left to the discretion of the Court"; and if so, then by the express terms of s. 49 of the Act of 1873 an order as to those costs was not subject to any appeal except by leave of the Court making the order. The Legislature had directed that in this matter, as in others with which your Lordships are familiar, the order of the first Court should be final.

But very little time had elapsed after the passing of the Act of 1873 before an inroad was made upon the operation of s. 49, and the breach then made in that section has grown to such an extent that it is (I think) necessary now to review the whole position. In making this review I do not propose to deal with those cases (such as *In re Foster* v. *Great Western Ry. Co.* (1) and *In re Mills' Estate* (2)), in which a tribunal was held to have awarded costs without any jurisdiction to do so; or with those other cases (such as *The City of Manchester* (3) and *Bew* v. *Bew* (4)), in which a judge had taken the mistaken view that he had no discretion as to costs: for in such circumstances a Court of Appeal may rightly intervene to decide the question of law. Nor is it necessary to refer to the cases which have arisen as to costs awarded under the County Courts Act or the Arbitration Act, to which s. 49 of the Judicature Act, 1873, and the corresponding section of the Act of 1925 have no application; or to the "good cause" cases, which relate to the costs of a trial with a jury. I propose to confine my attention to

(1) (1881) 8 Q. B. D. 25.
(2) (1886) 34 Ch. D. 24.
(3) (1880) 5 P. D. 221.
(4) [1899] 2 Ch. 467.

the reported cases, few in number, in which the Court of Appeal has allowed an appeal from the exercise by a judge of the Supreme Court of his discretion as to the costs of a trial without a jury, no leave to appeal having been obtained.

The first of these cases is *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1), in which the trial judge (Bigham J.) had given judgment for the defendants, but because the defendants had refused to refer the dispute to him as arbitrator, had ordered that the parties should bear their own costs. The defendants having appealed against the order as to costs, the Court of Appeal entertained their appeal and reversed the order, Lord Halsbury stating his reasons as follows: "No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Bigham J., and in the judgment of this Court, they are right; and it practically comes to this—that the learned judge has deprived the persons sued of what, prima facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion." Lord Alverstone, the other member of the Court, agreed, saying that "if it appears that a judge has not exercised his discretion, or has decided upon grounds which are not open to him, this Court can still deal with his

(1) [1903] 2 K. B. 756, 765, 766.

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decision"; and he relied on *Granville & Co.* v. *Firth* (1), which, being a "good cause" case, was not in point.

In *King & Co.* v. *Gillard & Co.* (2), in which the defendants were sued for passing off their goods as the goods of the plaintiffs, Kekewich J. had given judgment for the defendants, but had refused to order the plaintiffs to pay the defendants' costs on the ground that the wrappers in which the goods in question were sold contained untrue statements as to certain medals and awards. The Court of Appeal, while dismissing the plaintiffs' appeal on the merits, allowed a cross appeal by the defendants as to costs on the ground that, even if the untrue statements on the wrappers were calculated to deceive the public, the wrong so done was a collateral matter and was not directly connected with the plaintiffs' case. Stirling L.J. added that the case was very near the line, and that, if the learned judge had exercised his discretion on the ground taken by him combined with other facts of the case, it would have been difficult to interfere.

In *Edmund* v. *Martell* (3), an action by the landlords of a dwelling-house against the tenant for waste by converting part of the premises into a shop, Sutton J. gave judgment for the defendant on the ground that the waste committed by her was of the species known as ameliorating waste, but he made no order as to costs, because he thought that the defendant should have approached her landlords before making the alterations. The decision of the learned judge as to costs was reversed by the Court of Appeal, who held that the defendant's failure to approach her landlords was not relevant to the question to be determined between the parties, and that the judge had "not really exercised his discretion at all in the matter." It is noteworthy that in this case also Lord Alverstone relied on *Granville & Co.* v. *Firth* (1), a "good cause" case.

Lastly, in *Ritter* v. *Godfrey* (4) an action against a medical practitioner for negligence, McCardie J., who tried the action

(1) 19 Times L. R. 213.
(2) [1905] 2 Ch. 7.
(3) 24 Times L. R. 25.
(4) [1920] 2 K. B. 47, 52, 60, 61.

without a jury, found for the defendant, but refused to order the plaintiff to pay the defendant's costs of action on the ground that the defendant, in repudiating the plaintiff's claim, had written some letters of an unsatisfactory and, indeed, of an insulting character. The defendant having appealed as to costs, the Court of Appeal took the view that the correspondence did not afford ground for the exercise of the judicial discretion to refuse to award costs to a successful defendant, and on that view set aside the judgment of the trial judge and ordered that judgment be entered for the defendant with costs. Lord Sterndale M.R., who concurred in this decision with much doubt, stated the principle as follows: "This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this Court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine." Atkin L.J. took a more decided view, saying: "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains. . . . . I am aware of the inconvenience of fettering by rules the exercise of what

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in terms appears to be an unfettered discretion. But it is too late to contend for an arbitrary discretion over costs: some rules undoubtedly there are that control the discretion: and it seems hard to require a judge to exercise his discretion according to rule, and yet not to be able to state what the rule is. Nor if the rule is to be formulated does it appear helpful to cast it in the negative form of a string of prohibitions leaving the guiding principles to be deduced from them." Eve J. took a similar view, holding that a judge, however much he might disapprove of the defendant's behaviour, was not entitled to refuse him his costs unless he had material upon which he was prepared to hold judicially that the defendant had thereby created a mistaken belief in the plaintiff's mind, or that his misconduct was the real cause of the action being brought.

My Lords, these authorities appear to me to indicate a progressive tendency on the part of the Court of Appeal to review the exercise by trial judges of their discretion as to costs, with the result that the Court has travelled far from the categorical terms of s. 49 of the Act of 1873. The decision in the *Civil Service Co-operative Society's* case (1) may no doubt be supported by the consideration, which obviously weighed with Lord Halsbury, that the trial judge in that case had taken action, not upon materials which emerged in the trial itself, but upon his personal view that no trial should properly have been insisted upon: and in such circumstances there may well have been ground for holding that he had not really exercised his discretion. But the fraudulent conduct of the defendants in *King & Co.* v. *Gillard & Co.* (2), and in *Edmund* v. *Martell* (3) the circumstance that the defendant had altered the character of the plaintiffs' property without consulting them, were surely sufficiently connected with the matters in dispute to entitle a judge having a wide discretion to take them into account when awarding costs; and the same may, I think, be said of the conduct of the defendant in *Ritter* v. *Godfrey* (4)

(1) [1903] 2 K. B. 756.
(2) [1905] 2 Ch. 7.
(3) 24 Times L. R. 25.
(4) [1920] 2 K. B. 47.

towards persons who had suffered a real sorrow while one of them was under his care. Further, the language used in the last mentioned case by Atkin L.J. and Eve J., who expressed the opinion that the trial judge in a non-jury case "must" give the successful defendant his costs except in certain cases which they defined, is difficult to reconcile with the statutes and rules which give him an absolute and uncontrolled discretion. Indeed the rules laid down in that case by those learned judges bear so close a resemblance to those which would guide a judge in determining whether there was "good cause" for depriving of his costs a successful defendant in an action tried with a jury, that, if they are held to be binding, little or no difference will be left between the power of a judge over costs in an action tried with a jury and that which the statute gives him in the case of a trial without a jury. A gloss upon the statute which leads to so complete a frustration of its purpose surely calls for very close and critical examination in your Lordships' House; and, although some of the cases cited have stood unchallenged for a good many years, I do not think that it is too late for this House, which now for the first time has seisin of the matter, to review them. The protest of North J. in *Walter* v. *Steinkopff* (1), and the doubts expressed by Stirling L.J. and Lord Sterndale, have kept the question open; and in any case the matter is one, not of mere procedure, but of statutory right, and no course of decision can override the statute.

My Lords, it appears to me that the true view is substantially that taken by Lord Sterndale in the above quoted passage in his judgment in *Ritter* v. *Godfrey* (2), although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion,

(1) [1892] 3 Ch. 489, 500. (2) [1920] 2 K. B. 47.

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like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our Courts would never in fact be realized—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.

Judged by these tests I doubt whether the decisions in *King & Co.* v. *Gillard & Co.* (1), *Edmund* v. *Martell* (2) and *Ritter* v. *Godfrey* (3) can be supported; and judged by the same tests I am satisfied that the order made by the Court of Appeal in the present case cannot stand. Even if the rules laid down in *Ritter* v. *Godfrey* (3) were to be applied, I should find difficulty in holding that, in the present case, Branson J. had no materials for the exercise of his discretion. The verdict on which the learned judge proceeded was rendered in the consolidated action, and was, therefore, part of the proceedings in the present action; and it was frequently referred to in the evidence given during the new trial of this action. It was, therefore, fully before the learned judge, and he was entitled to take it into account in considering whether the defendant had brought this litigation upon himself and to decline on that ground to give him the costs of the action. Further, although the verdict formed the main ground for the judge's decision as to costs, he stated that other points also had weight with him; and the influence

(1) [1905] 2 Ch. 7. (2) 24 Times L. R. 25.
(3) [1920] 2 K. B. 47.

of those other points on his mind could not be and was not estimated by the Court of Appeal. On the merits, therefore, and assuming that the Court of Appeal had power to interfere, I should be disposed to allow this appeal; and, if your Lordships should agree with the view which I have expressed on the question of jurisdiction, it is clear that the appeal should succeed.

For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of Branson J. restored. But as the principal question discussed in this judgment was not raised by the present appellants either in the Court of Appeal or in their case for the present appeal, I am content that there should be no costs of the appeals to the Court of Appeal and to this House, except so far as such costs have already been disposed of on the hearing of the preliminary objection. I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I have had the advantage of perusing the judgment which has just been delivered by the Lord Chancellor. I concur in that judgment, and I have nothing to add.

LORD ATKINSON. My Lords, I think it is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. A good deal of the arguments addressed to the House on behalf of the appellants in this case appeared to me to go the length of contending, either that the discretion of the judge was absolute and unfettered, or that, though the exercise of it might have given free scope to whim or prejudice, it must be assumed that, where discretion is given to a judge, it will always be properly exercised, the judge not being bound to disclose the facts, if any, upon which he acted. If, however, there be, in fact, some grounds to support the exercise by the trial judge of the discretion

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he purposes to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the judge himself to decide, and the Court of Appeal cannot interfere with the exercise of his discretion in that instance. I take this statement of the law, applicable to cases tried without a jury, from the judgment of Lord Sterndale M.R. in the case of *Ritter* v. *Godfrey*. (1) He said: "This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this Court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine. One other consideration applies to these cases. The principle as to the exercise of discretion is the same in the case of plaintiffs and defendants, but it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation, while the latter is brought into it against his will."

My Lords, I think this judgment of Lord Sterndale contains a clear, condensed and accurate statement of the law and of the prevailing practice on the points with which it deals. He then proceeds to state what, in his view, is regarded as sufficient ground for refusing a defendant his costs. He says: "Speaking generally, I think it may be said that, in order to justify an order refusing a defendant his costs,

(1) [1920] 2 K. B. 47, 52.

he must be shown to have been guilty of conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought. This is so stated by Vaughan Williams L.J. in *Bostock* v. *Ramsey Urban Council*." (1) This last is a very important case, because it follows the decision of the Court of Appeal in *Harnett* v. *Vise* (2), and lays down the important principle, that in exercising his discretion under Order LXV., r. 1, in a case heard by a jury, a judge is not confined to the consideration of the defendant's conduct in the actual litigation itself.

A. L. Smith L.J., in giving judgment in the Court of Appeal in the former case, said (3): "It seems to me that the Lord Chief Justice was right when on general principles he came to the conclusion that 'the judge is not confined to the consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation.'" The Lord Justice proceeded: "I say on general principles, because his attention does not appear to have been called to the case of *Harnett* v. *Vise* (2), in which it was distinctly held by the Court of Appeal that the judge is not confined, in considering the question whether there is good cause for depriving the successful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that in this case there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the judge was entitled to take into consideration as constituting good cause for depriving the defendants of costs." Vaughan Williams and Romer L.JJ. concurred. The last named Lord Justice, in delivering judgment, said (4): "It is clear that the 'good cause' referred to by Order LXV., r. 1, is not confined to cause founded upon the conduct of the successful party in the course of the litigation. It might, for example, in the

(1) [1900] 2 Q. B. 616.
(2) (1880) 5 Ex. D. 307.
(3) [1900] 2 Q. B. 622.
(4) [1900] 2 Q. B. 627.

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case of a successful defendant, be founded on conduct of the defendant outside the action, if the conduct were such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. I limit the proposition so as to show clearly that I do not consider that such conduct on the part of the defendant would constitute good cause within Order LXV., r. 1, if it had no reference to the action, and did not induce the plaintiff reasonably to believe that he had a right of action." In the case of *Harnett* v. *Vise* (1) the action was brought by a doctor who practised at Barnet against the defendant and his wife for a letter written by the latter to an old lady named Perkins, who had for some time been confined in a lunatic asylum, but was at the date of letter convalescent, warning her against having any further communications with the plaintiff and making reflections upon him. The defendant traversed the innuendoes alleged in the statement of claim, pleaded that the letter was a privileged communication and also pleaded a justification. The case was tried before Huddleston B. and a special jury. The judge ruled that the letter was not a privileged communication, and the jury found a verdict for the plaintiff for 10*l.* damages. After the verdict had been returned the counsel for the defendant applied to the judge to exereise his power under Order LV. (then the proper Order) and deprive the plaintiff of his costs on the ground that he had brought the libel on himself by his incautious conduct. The learned judge acceded to this application and refused to allow the plaintiff his costs. An application was made by the plaintiff to the Court of Exchequer to rescind this order, which was refused. The plaintiff appealed to the Court of Appeal. The appeal was heard by James L.J., Brett L.J. (as he then was) and Cotton L.J. In delivering judgment James L.J., after referring to the amount of the damages awarded, said (2): "Every judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the judge who

(1) 5 Ex. D. 307. (2) 5 Ex. D. 311.

tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may shew that the action was not properly brought in respect of the libel complained of."

Of the many judicial criticisms which have been passed upon this Order LXV., r. 1, and its application none is, I think, clearer and more helpful than that of Bowen L.J. (as he then was), passed in the case of *Jones* v. *Curling* (1), an action tried before a judge and jury. [His Lordship then repeated the passage cited by him in his judgment on the preliminary objection down to the sentence : " When, however, this jurisdiction is established, then I think there is no appeal unless the judge's discretion is exercised in such a wrong way as to make it no reasonable exercise of discretion at all."] These last words are very significant, and mean that if the established facts of the case amount to such good cause as to give the judge jurisdiction to exercise his discretion, he must exercise that discretion in such a way as to amount to a reasonable exercise of it. An exercise of it based on whim or prejudice would be insufficient. The Court, composed of Brett M.R., Bowen and Fry L.JJ., held that to be good cause within this rule there must be facts showing that it would be more just not to allow costs to follow the event as, for example, oppression or misconduct of either of the parties by which costs have been unnecessarily increased. In an appeal to this House in the case of *Huxley* v. *West London Extension Ry. Co.* (2) Lord Watson said he would not attempt to define what good cause was, but that, in his opinion, it embraced everything for which the party is responsible connected with the sustentation and conduct of the suit and calculated to occasion unnecessary litigation or expense ; he said : " So long as the judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are

(1) 13 Q. B. D. 262, 271. See ante, p. 771. (2) 14 App. Cas. 26, 34.

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constituted sole arbiters; they are acting within their jurisdiction and their decisions are final and conclusive." So much for the case under the proviso to this rule. There remains the question as to what is the nature of the discretion conferred upon the judge in cases tried by a judge without a jury. Is it entirely arbitrary, subject to no qualification or restraint? Must a litigant who has succeeded in a suit and has not been guilty of misconduct of any kind be, on being deprived of his costs, content with the assurance that a judge exercised his discretion properly, though he has not mentioned or even suggested what the grounds were upon which he based the exercise of that discretion?

The decision in the case of *Kierson* v. *Joseph L. Thompson & Son* (1) throws some light upon the question of judicial discretion as to everyday cases. The facts are stated with sufficient fullness in the headnote and the judgment of Cozens-Hardy M.R., concurred in by Buckley and Hamilton L.JJ.: "A workman who was in receipt of a weekly payment of 13*s.* 5*d.* from his employers as compensation for an accident within the meaning of the Workmen's Compensation Act, 1906, entered into an agreement to accept 100*l.* in satisfaction of the employers' liability. The workman applied to the registrar to have a memorandum of the agreement recorded. The registrar, being dissatisfied with the amount of the commutation, referred the matter to the judge. Both parties appeared and supported the agreement. The judge overruled the objection as to quantum, and directed the memorandum to be recorded, ordering the employers to pay the costs. The employers appealed from the order as to costs." The Master of the Rolls in giving judgment said: "Both the employers and the workman were then cited to appear and did appear before the judge. The objection to the agreement was solely based on quantum, and this objection the judge overruled, and held that the memorandum should be recorded. Assuming, as I do, that the judge had a discretion as to costs, it must be exercised judicially, and, in my opinion, it was not a judicial exercise of his discretion to order a party

(1) [1913] 1 K. B. 587, 589.

who has been completely successful and against whom no misconduct is even alleged to pay costs"; see also *Hudsons, Ld.* v. *De Halpert* (1); *Levy* v. *Johnson.* (2)

In *Ritter* v. *Godfrey* (3) Atkin L.J. criticized with great fullness and force all the cases I have referred to and some others in addition; he began his judgment thus: "In order to determine this appeal it seems to me necessary to pass in review some of the more recent authorities which have dealt with the provisions of Order LXV., r. 1. Costs are to be in the discretion of the Court or judge." (The judge who tried this case had refused to give the successful defendant his costs.) "If this discretion is absolute the appellant must fail; if the discretion is limited, then the appellant must show that the exercise of the discretion in this case exceeded the proper limits. I think that it will appear from the authorities to be mentioned that the discretion of the Court or a judge is not an absolute discretion, but must be exercised subject to certain governing principles which in this appeal it seems to me necessary to ascertain."

He then divides the authorities into two groups, the first group comprising trials by a judge and jury, and the second trials by a judge alone, and he says: "Where the Courts have held that there is good cause for deprivation of costs after trial by jury, I think it clear that under similar circumstances after trial without a jury the exercise of the discretion in the same way must be justifiable." For the purpose of the present case, I pass over the learned Lord Justice's comments on the cases in which there was a trial by jury, and only refer to his criticisms on those cases in which there was no jury. The first case with which he deals is *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (4) The learned judge who tried the case had deprived the successful defendants of their costs, apparently because they would not submit to the learned judge himself, as arbitrator, saying what in the circumstances should be done. The learned judge did not state why he had deprived the successful

(1) (1913) 108 L. T. 416.
(2) (1913) 29 Times L. R. 507.
(3) [1920] 2 K. B. 47, 54.
(4) [1903] 2 K. B. 756, 765.

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defendants of their costs. If his discretion was absolute there was an end of the matter. It could go no further. The Court of Appeal would not be concerned with the question whether he had grounds for the exercise of his discretion or not. The Court of Appeal took precisely the opposite view. Lord Halsbury, in giving judgment, after referring to what the judge at the trial did, said: "That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion."

The next case to which the Lord Justice refers is that of *King & Co.* v. *Gillard & Co.* (1) It was a passing off action. The judge held that there was no passing off, but deprived the defendants of their costs on the ground that there were misleading and untrue statements in the advertisement upon some of the defendants' packages which were calculated to deceive the public, though they had no bearing on the question of passing off. It was held by the Court of Appeal that the defendants had not acted dishonestly, but that even if they had been guilty of misrepresentation it had no relation to the plaintiffs' case, and was not therefore a ground on which the judge had a discretion to deprive the defendants of their costs. The learned Lord Justice next refers to the case of *Edmund* v. *Martell* (2), heard in 1907. The judge at the trial had deprived the defendant of her costs on the ground that before she had done one of the acts which were complained of by the landlord she ought to have consulted him. Lord Alverstone, who was presiding in the Court of Appeal, after referring to *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3), said that the case then before the Court "was an a fortiori case. Mr. Justice Sutton thought that because the defendant did not approach her landlord on the matter of converting the house into a shop she should be deprived of costs. That had nothing

(1) [1905] 2 Ch. 7. (2) 24 Times L. R. 25.
(3) [1903] 2 K. B. 756, 765.

to do with the grounds of the action." Buckley L.J. (as he then was) said: "The facts upon which a judge could exercise his discretion in depriving a successful litigant of costs must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The judge had no power to deprive the successful litigant of costs because in some matter not material he might think that that party should have behaved, say, with more courtesy or consideration. These were not matters upon which the Court could act."

To *Higgins* v. *Higgins & Co.* (1) Atkin L.J. next refers. It was a case under the Workmen's Compensation Act. The judge in such cases is given by the Act the same discretion as to costs as is given by the terms of Order LXV., r. 1. There the judge had made a declaration of liability, and had ordered the employers, who were considered by the Court of Appeal to have been successful, to pay the costs. Bankes L.J., in giving judgment, said: "By para. 7 of Sch. II. of the Workmen's Compensation Act, 1906, the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the arbitrator, just in the same way as the costs of proceedings in the High Court are in the discretion of the judge where the case is not tried by a jury under Order LXV., r. 1. In both cases, however, the discretion is fettered by a well accepted rule which was stated by Lord Halsbury in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2), in these words: 'No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.'"

Lower down (3), Atkin L.J. proceeds to lay down three principles by which a judge may be able to discern whether the materials necessary to support the exercise of his judicial

(1) [1916] 1 K. B. 640, 643. (2) [1903] 2 K. B. 756, 765.
(3) [1920] 2 K. B. 60.

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discretion exist in any given case. The principles he shortly stated as follows: "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains. These principles require further expansion. By (1.) is meant—has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this proposition is *Bostock* v. *Ramsey Urban Council*. (1) It is wide, for in terms it is not limited to unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect upon the plaintiff's mind of defendant's conduct, and the effect is at any rate to induce a belief that the plaintiff has a good cause of action, it would appear to follow that, provided the belief was reasonable the judge in all such cases has grounds for depriving a successful defendant of costs. I presume e converso there would be grounds for dealing with a successful plaintiff's costs when his conduct has induced the defendant reasonably to believe that he has a good defence. I am inclined to think therefore that the propositions in *Bostock* v. *Ramsey Urban Council* (1) should be read subject to the first, if not also to the second, of the limitations suggested above—i.e., subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action." Eve J. delivered a clear and able judgment to the same effect.

In my view, it necessarily follows from those authorities that if a defendant in a case tried before a judge alone be charged with fraud and successfully defends himself against that charge, he may yet be deprived of his costs if he has

(1) [1900] 2 Q. B. 616.

in fact been guilty of misconduct coming within one of the classes indicated by Atkin L.J. There is no such principle or rule of practice that, if a defendant accused of fraud obtains from either a judge or jury a decision that he is not guilty of the fraud, he is necessarily entitled to his costs, whatever his conduct in other respects, and cannot be justly deprived of them.

Branson J., at p. 62 of the Appendix, when dealing with the two actions which were brought, the one by the firm against Pollak and the other by the liquidator against the same man, explains the relation in which they stood to each other, and points out that it is the company's claim of which he is now endeavouring to dispose. He then, at p. 92 of the Appendix, when giving judgment, spoke as follows: "I do not think it is either necessary or desirable that I should go in great detail through all the many facts of this long and troublesome action, which has lasted some nine days before me. I think it is sufficient for me to say this, that in my view the real reason why the action was brought by the liquidator, and the real reason which forced him, in my view, in the proper execution of his duty, and also the creditors of the company, to bring the action, was the fact that Mr. Pollak had, in his dealings with Said, begun with a concealed partnership with Said, of which every trace was kept out of the books, and that so far as anybody looking at the books is concerned, once it appears that Pollak was a partner with Said in the first of the transactions in which Said took part, there is nothing to show when he ceased to be a partner. I think a man who puts himself into that position has only himself to blame if anybody who is concerned to make him liable on the contracts with Said which follow brings an action against him in respect of them. That is the main ground put forward by the liquidator for the course which he asks me to take in the matter, and it is the main ground upon which I accede to the request that he makes. The real reason why I am doing what I propose to do in this case is, as I have stated, the fact that I believe that if it had not been for Pollak entering into this partnership with

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Said in the way in which he did, and keeping all the record out of the books which would lead anybody to know it, and keeping the knowledge of it from his subordinates in the department, this action need not have been brought. It was his fault that it was brought, because his conduct, and guilty conduct, in a matter which is outside the immediate cause of action which is being brought against him here, and so satisfies every one of the limitations which are stated by Lord Justice Atkin is the real cause of the initiation and the prosecution of this litigation. The result is that I think this is one of those cases in which it is clear that the defendant has brought the litigation upon himself, and by the way in which he has behaved himself, and consequently is an appropriate case in which, in the exercise of the discretion which in such cases I possess, I should say that I make no order for costs."

The Court of Appeal appear to me to have based their decision on this ground, that Pollak is not estopped by the verdict of the jury against him from denying that he was dealing improperly in speculating with Said, of which no mention was made in the books of the firm, or by the finding of the jury that he did not inform the other members of the firm that he was doing so, that accordingly it was open to Pollak to deny on oath both the accusation which the jury in the first action found to be true, that he reiterated the statement he had made at the first trial on these points, and that none of the members of the firm were produced on the second trial as they were upon the first to prove that Pollak never asked for or got the consent of his co-partners to the course of dealing he pursued. Branson J. held that Pollak was not guilty of the fraud charged against him on the second trial, but, notwithstanding this, he was clearly of opinion that he was shown to be guilty of the misconduct, which he indicates and describes, of a character which entitled the judge to deprive him of costs. That is a wholly different thing—if the learned judge was entitled to take into consideration the whole circumstances of the case and everything which led up to the action. The cases of *Harnett* v.

Vise (1) and *Bostock* v. *Ramsey Urban Council* (2) decide that he was so entitled, then, if so, there were, in my opinion, some grounds to support his order. And if there were, he had jurisdiction to make it, and neither the Court of Appeal nor this House have any jurisdiction to interfere with his order, because they are of opinion that the grounds were insufficient. In my view then the appeal succeeds.

THE LORD CHANCELLOR. My noble and learned friend Lord Phillimore desires me to say that he agrees with the judgment which I have delivered.

LORD CARSON (read by VISCOUNT DUNEDIN). My Lords, I agree with the motion proposed by the noble Viscount on the Woolsack. I am not at all sure that the course of legal decisions has not gradually so circumscribed the discretion as to costs given to a judge in cases tried by him alone without a jury as to render such discretion almost nugatory. Indeed, Atkin L.J. in the quotation made by the noble Viscount from his judgment in *Ritter* v. *Godfrey* (3), seems to lay down that such discretion must be exercised under formulated rules, which appear to me to leave very little "discretion" to the judge. It is not surprising, therefore, in this state of the authorities that protracted litigation as to costs only should ensue, involving in some cases a rehearing of the action and a reproduction of the evidence and documents used at the trial in order to enable a full inquiry as to whether the judge has acted within the rules laid down in the cases already decided. This, I think, is a result quite contrary to what was intended by the provisions of the Judicature Acts and the Rules of the Supreme Court already quoted, which drew a clear line as to costs where issues were tried before a judge and a jury respectively. It seems strange that in the course of so many authorities so little attention has been given to s. 49 of the Judicature Act, 1873. The words of the section are clear and explicit,

(1) 5 Ex. D. 307. (2) [1900] 2 Q. B. 616.
(3) [1920] 2 K. B. 47.

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and deal not with the exercise of the discretion but with the question whether the discretion is conferred upon the judge, and, in my opinion, no matter what the practice may have been hitherto, we are bound to give full effect to it. The only question we have to determine under that section is : Was the order of Branson J. as to costs made in a case where the costs are by law left to the discretion of the Court ? The very basis of the appeal is that the learned judge had such a discretion and, indeed, that could not be disputed. In such a case the section says that the order made by the judge is not subject to appeal, and therefore neither the Court of Appeal nor this House is competent to entertain such an appeal.

Whilst, therefore, it is, of course, true that a judge ought to exercise his discretion judicially, whether he has done so or not is a question which cannot be raised on appeal as to costs, unless the judge gives leave as provided by the section.

Order of the Court of Appeal reversed, and judgment of Branson J. restored. The respondent to pay the costs of the petition praying that the appeal might not be received as being incompetent, and also the costs of the hearing at the Bar on the question of competency ; and, save as aforesaid, no costs to be allowed to either side here or in the Court of Appeal. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

—*Lords' Journals*, July 29, 1927.

Solicitors for the appellants : *Bull & Bull.*
Solicitors for the respondent : *Wedlake, Letts & Birds.*

[HOUSE OF LORDS.]

JONES . . . . . APPELLANT ; H. L. (E.)*

AND

SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCIATION, LIMITED } RESPONDENTS.

1927

July 12.

Revenue—Income Tax—Profits of Trade—Mutual Insurance—Contributions of Members to Company—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A company limited by guarantee had for its sole effective purpose the indemnity of its members, who were all coalowners, against liability for compensation in respect of fatal accidents to workmen in their employment. It was a purely mutual concern, every person indemnified by the Association being a member of the Association, and every member being indemnified by the Association. Under the articles a fund was to be established by means of ordinary calls to be made yearly upon the members in proportion to their disbursements by way of wages or salaries. Out of this fund the members were to be indemnified against claims for compensation, and at the end of each year the surplus of the fund over the expenditure and liabilities of the Association was to be carried to a reserve fund. The committee, upon which all the members served or were represented, was also empowered to make extraordinary calls upon the members for the purpose of meeting any deficiency in the fund or for strengthening the reserve. There were provisions enabling the transferee of a mine belonging to a member, or the representatives of a member who might die or become bankrupt, to be substituted for such member, and provisions entitling a member on retirement to receive out of the reserve a payment to be ascertained in accordance with a method prescribed by the articles; but, subject to these provisions, the funds were to remain with the company, and in the event of a winding up were to be divided among the members in the proportions prescribed :—

Held, that the surplus of the calls received by the Association from its members over the expenditure for the year did not constitute profits liable to income tax.

New York Life Insurance Co. v. *Styles* (1889) 14 App. Cas. 381 applied.

Decision of the Court of Appeal [1927] 1 K. B. 33 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Rowlatt J., which affirmed a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully stated in the report of the case before Rowlatt J. and the Court of Appeal and are summarized in the headnote.

* *Present :* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

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1927. May 10, 12. *Sir Thomas Inskip S.-G.* and *Reginald Hills* for the appellant. The question is whether the contributions of the members are to be taken into account in estimating the liability of the respondent company to income tax. It is not disputed that this is a company which carries on a trade or business within the meaning of the Income Tax Act, 1918, and, assuming the existence of a trade or business, whatever comes in has to be taken into account in estimating the income of the company and the surplus of the incomings over the outgoings is the profit. If the company earns a profit it is immaterial how that profit is applied: *Mersey Docks and Harbour Board* v. *Lucas.* (1) The company owns the contributions of the members in response to calls, and the mere fact that the receipts of the company are to be dealt with in a certain way does not prevent the surplus of receipts over expenditure from being a taxable profit: *Last* v. *London Assurance Corporation* (2); *In re Padstow Total Loss and Collision Assurance Association* (3); *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners.* (4) The reserve fund belongs to the company and is available to creditors, and no individual member has an interest in it. In *New York Life Insurance Co.* v. *Styles* (5) the only ratio decidendi of the majority was the automatic returnability of the contributions to the members, but here there is nothing which is automatically returned to the members. In that case the existence of the company was perfectly immaterial; here it is all important. If the company were merely a legal entity to collect and hand back the moneys to the contributory members, then no doubt *Styles'* case would apply, but that is inconsistent with the facts of this case.

[They also referred to *Vallambrosa Rubber Co.* v. *Farmer* (6) and *Inland Revenue Commissioners* v. *Eccentric Club.* (7)]

Latter K.C. and *H. P. Glover* for the respondents were not called on.

(1 (1883) 8 App. Cas. 891, 903.
(2) (1885) 10 App. Cas. 438.
(3) (1882) 20 Ch. D. 137, 143, 144.
(4) [1926] A. C. 281.
(5) 14 App. Cas. 381.
(6) (1910) 5 Tax Cas. 529.
(7) [1924] 1 K. B. 390, 414.

The House took time for consideration.

1927. July 12. VISCOUNT CAVE L.C. My Lords, this is an appeal by an inspector of taxes from a decision of the Court of Appeal affirming the judgment of Rowlatt J. on a case stated by the Commissioners for the Special Purposes of Income Tax, and raises the question whether the respondent Association is assessable to income tax in respect of the surplus of its receipts in each year over the expenditure for the year as being profits of a trade or business.

The Association, as the Commissioners have found, has for its sole effective purpose the indemnity of its members (who are all coalowners) against liability for compensation in respect of fatal accidents to workmen in their employment. The Association is a purely mutual concern, every person indemnified by the Association being a member of the Association and every member being indemnified by the Association. Under the scheme as set out in detail in the articles of association, a fund was to be established by means of "ordinary calls" to be made yearly upon the members in proportion to their disbursements by way of wages or salaries; out of this fund the members were to be indemnified against claims for compensation, and at the end of each year the surplus of the fund over the expenditure and liabilities of the Association was to be carried to a reserve fund. The committee, upon which all the members serve or are represented, is also empowered to make "extraordinary calls" upon the members for the purpose of meeting any deficiency in the fund or for strengthening the reserve. There are provisions enabling the transferee of a mine belonging to a member, or the representatives of a member who may die or become bankrupt, to be substituted for such member, and there are also provisions entitling a member on retirement to receive out of the reserve a payment to be ascertained in accordance with a method described in the articles; but subject to these provisions the funds are to remain with the company, and in the event of a winding up are to be divided among the members in proportions prescribed. A reserve

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fund has in fact been established, which at the date of the assessment in dispute exceeded 150,000*l.*

The Association has, of course, paid or borne income tax upon the income from its investments representing the reserve fund, and as to this no question arises; but in the year 1920–21 an additional assessment was made upon it by the Additional Commissioners for the Warrington Division in the sum of 20,000*l.*, which was considered to represent the "calls" received in respect of that year after deducting the expenditure and liabilities of the Association. On appeal to the Special Commissioners, the additional assessment was discharged; and the decision of the Special Commissioners has been affirmed by Rowlatt J. and by the Court of Appeal. The question is, whether that decision is right.

My Lords, when a question of law has been clearly decided by this House, it is undesirable that the decision should be weakened or frittered away by fine distinctions; and it appears to me that the decision of the House in the case of *New York Life Insurance Co.* v. *Styles* (1) completely covers this case. In that case the company concerned was a life insurance company which had no shares or shareholders, the only members being the holders of participating policies. A calculation was made in each year of the probable liabilities and expenses of the company for the year, and the amount claimed for premiums from the members was founded on that calculation. At the end of the year an account was taken, and the greater part of the surplus of premiums over expenditure was returned to the policy holders, either in cash or by an addition to the sums secured or a reduction of future premiums, the remainder of the surplus being carried forward as funds in hand to the credit of the general body of members. Income tax having been claimed on the surplus of the premiums received for a year over the expenditure for that year as profits or gains under Sch. D, it was held in this House that there were no such taxable profits. Lord Watson expressed his opinion as follows (2): "When a number of individuals agree to contribute funds for a common purpose, such as

(1) 14 App. Cas. 381. (2) 14 App. Cas. 394.

the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him. For these reasons I have come to the conclusion that the transactions of the appellant company, in so far as these relate to participating policies, do not constitute the carrying on of a trade, within the meaning of the Income Tax Acts, and that the surplus funds returned or credited to its members are not profits." Lord Herschell dealt with the point as follows (1): "Persons who agree to contribute to a common fund for mutual insurance, certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or over-caution, been originally fixed at a higher rate than was necessary, or from the death rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute for

(1) 14 App. Cas. 409.

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a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a 'profit' arising or accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed them of leaving the excess in the common fund, and so increasing their representatives' claim upon it in case of death, but I cannot think that this makes any difference." Lord Macnaghten agreed, and the House by a majority held that no tax was payable.

Counsel for the appellant contended that the present case was distinguishable from the *New York Life Insurance Co.'s* case (1) on the ground that, whereas the company there in question returned to its participating policy holders the surplus of its receipts over its expenditure at the end of each year, the articles of the respondent association require that surplus to be carried to reserve and not at once returned to the members. I do not think this a sound distinction. In this case, as in the *New York Life Insurance Co.'s* case (1), there are no shareholders interested, and the whole of the yearly surplus remains to the credit of the members, and must either be applied to meeting their future claims or be returned to them on retirement. Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them; and the association does not in any true sense make a profit out of their contributions. It may be added that in that case, as in this, some part of the receipts of each year was carried forward as funds in hand.

It was argued that this view gives no effect to the well established distinction between a company and its members, and that, although the members may make no profit, a profit may still accrue to the company. The same point arose

(1) 14 App. Cas. 381.

in the *New York Life* case (1), and was disposed of in the speeches of Lord Herschell and Lord Macnaghten. Lord Herschell, after stating that the Attorney-General (who in that case appeared for the revenue authorities) had conceded that the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated was immaterial, and that the case might be treated as though it were an association of individuals unincorporated, added: "I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated." Lord Macnaghten dealt with the same point as follows: "It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated company. But the company (so far as regards the participating policy-holders) was not formed for the purpose of carrying on a business having for its object the acquisition of gain. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company, was properly treated as immaterial." It appears to me that the reasoning which commended itself to those distinguished jurists in the *New York Life* case (2), applicable as it is to genuine mutual concerns and to no others, applies to the present case, and disposes of the contention now under discussion.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT DUNEDIN. My Lords, I concur. The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end

(1) 14 App. Cas. 408, 411. (2) 14 App. Cas. 381.

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to be redundant, be returned to the shareholders either in the form of reduced premiums or of cash. The basis of the Crown's case seems to me to fail, apart from the fact that I agree that the present case is absolutely ruled by the case of *New York Life Insurance Co.* v. *Styles.* (1)

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble friend on the Woolsack, and I entirely concur in it.

LORD PHILLIMORE. My Lords, I concur.

LORD CARSON. My Lords, I also agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 12, 1927.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitor for the respondents: *William Pingree Ellen, for Peace & Darlington, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)* 1927 July 14.

WELSH NAVIGATION STEAM COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

EVANS AND ANOTHER . . . . . RESPONDENTS.

Workmen's Compensation—Dependency—Ordinary Necessaries of Life suitable for Class and Position—Savings—Workmen's Compensation Act, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 22.

The expression "Ordinary necessaries of life" in s. 22 of the Workmen's Compensation Act, 1923, does not include savings.

Peart v. *Bolckow, Vaughan & Co.* [1925] 1 K. B. 399 and *Kennedy* v. *Horden Collieries* [1925] 2 K. B. 438 considered.

The parents of a workman who was killed by accident arising out of and in the course of his employment claimed as partial dependants of their deceased son. The deceased lived in family with his father and

* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

(1) 14 App. Cas. 381.

mother and a brother. The deceased's weekly earnings were 1*l.* 13*s.*, the father's 4*l.* 4*s.*, and the brother's 3*l.* 17*s.* The deceased gave his mother all his earnings, out of which she kept him and provided him with pocket money. The parents were thrifty people, and they saved all the money obtained from each son except what was necessary to keep the son in food, clothes, and pocket money, and the father had saved 500*l.* The county court judge held on the facts that there was no dependency proved, and made an award in favour of the employers. The Court of Appeal set aside the award on the ground of misdirection, and remitted the matter to the county court judge for rehearing:—

Held, that there was evidence to support the conclusion of the county court judge on the facts and that he had not misdirected himself.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal setting aside an award made by the county court judge of Glamorganshire under the Workmen's Compensation Acts and remitting the matter to him for a rehearing.

The facts are stated in the opinion of Viscount Dunedin and are summarized in the headnote.

1927. May 31. *E. W. Cave K.C.* (with him *Victor Evans*) for the appellants. Partial dependency is a question of fact for the county court judge. There was ample evidence to support his conclusion, and he made no error of law. The Court of Appeal, relying upon certain opinions expressed in *Kennedy* v. *Horden Collieries* (1) and *Peart* v. *Bolckow, Vaughan & Co.* (2), thought that the county court judge had or might have misdirected himself, because he appeared to come to the conclusion that any savings made by the head of the household out of the family fund could not be required as necessaries for the provision of which the contribution could be used so as to make him partly dependent upon the deceased workman. The view taken by the Court of Appeal is founded upon a misconception of the effect of s. 22 of the Act of 1923, and is really inconsistent with the statement of the law by Lord Dunedin in *Fife Coal Co.* v. *M'Arthur* (3), which was decided by this House on the following day.

Montgomery K.C. and *A. T. James* for the respondent. It was the duty of the respondents to make reasonable provision

(1) [1925] 2 K. B. 438. (2) [1925] 1 K. B. 399.
(3) [1926] 19 B. W. C. C. 461; [1926] W. N. 333.

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for the future for themselves and their children, and the county court judge was wrong in law in holding that the savings so effected could not be ordinary necessaries of life within s. 22 of the Act of 1923.

The House took time for consideration.

1927. July 14. VISCOUNT DUNEDIN. My Lords, this is a case under the Workmen's Compensation Acts in which a father and mother claim as dependants of a deceased son who met his death by accident arising in the course of and out of his employment. The facts as set out by the county court judge in the case stated by him are simple enough. The deceased was a young coal miner twenty years of age, whose weekly average earnings were 1*l.* 13*s.* 1*d.* He lived in family with his father and mother and another brother. The father's weekly earning was 4*l.* 4*s.* 9*d.* and that of the other brother 3*l.* 17*s.* 9*d.* The deceased handed all his wages to his mother, who kept him and gave him 5*s.* pocket money. They were a thrifty family, and the father had saved 500*l.*

In the circumstances the county court judge held that there was no dependency proved, and he appended to his judgment the following note: "In this case the note of the evidence is very meagre because it was impossible to get definite answers from the deceased's father and mother. The conclusion I came to was that the parents, who were very thrifty people, had always saved money, that they saved all the money obtained from each son except what was necessary to keep the son in food, clothes and pocket money, and that under the circumstances the parents could not be said to be in any way dependent upon the contributions from the deceased son for the provision of the ordinary necessaries of life suitable for persons in their class and position."

The learned judges of the Court of Appeal set aside the award and remitted the case for a rehearing.

The reasons they gave for this course were that they thought the arbitrator had, or at least might have, misdirected himself, in so far as he had not, or might not have, considered

whether a certain part of the total family income retained as saving was also one of the necessaries of life, and whether if that sum was included the applicants were dependent on the contribution of the deceased. They particularly referred to the opinions given by themselves in the case of *Kennedy* v. *Horden Collieries* (1) and *Peart* v. *Bolckow, Vaughan & Co.* (2)

My Lords, very recently your Lordships gave judgment in the case of *Fife Coal Co.* v. *M'Arthur* (3), which had to do with this same question of dependency. That case was decided on December 3, 1926, and the present case was decided by the Court of Appeal on December 2, 1926; so that neither the Court of Appeal could know of your Lordships' judgment, nor were your Lordships aware of this case. I am bound to say that I do not think the opinion of the learned judges in the Court of Appeal can be reconciled with the opinions pronounced by your Lordships. The actual decision of the case of *M'Arthur* (3) turned on the effect of an admission, but your Lordships of set purpose examined s. 22 of the Act of 1923 (with which s. 4, sub-s. 2, of the Act of 1925 is identical), as opinions thereupon had been pronounced in the Courts below which were considered erroneous.

My Lords, I refer to the opinion I delivered in that case, which, so far as the construction of the section is concerned, was concurred in by all the noble Lords present. But in order to avoid any misunderstanding I will deal with what I may call the critical stages of the development of the question.

I begin with the judgment of the Court of Appeal in *Simmons* v. *White Brothers.* (4) The headnote of that case, which is accurate, is as follows: "Held, that in order to bring himself within the Act as a dependant, an applicant for compensation must show that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings."

(1) [1925] 2 K. B. 438.
(2) [1925] 1 K. B. 399.
(3) 19 B. W. C. C. 461; [1926] W. N. 333.
(4) [1899] 1 Q. B. 1005.

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Now it will be observed that there are two separate propositions involved in this judgment. The first is that dependent upon the earnings means dependent for the purposes of the ordinary necessaries of life. The Act only used the phrase "dependent upon the earnings," and therefore "for the purposes of the ordinary necessaries of life" was judicial interpretation. The second is that in order to find what are the necessaries of life you must take the average, and that average is to be sought among those who are in the same class and position of life as the applicant.

Now, when that case was displaced by the case of *Main Colliery Co.* v. *Davies* (1), the discussion turned, so far as I can see, much more on the second proposition than the first. Lord Shand, in his opinion, though agreeing as to the dislodgment of the second proposition, expressly saved the first. Lord Halsbury did not expressly disagree with the first proposition, though doubtless there are expressions in his opinion which seem to point that way, and which most certainly were afterwards held by the Courts of Appeal to have pointed that way. I think, however, that it is quite unnecessary to discuss whether Lord Halsbury's opinion was pressed beyond what it meant to go, because now it is no question of what Lord Halsbury did or did not say; the question is what the section of the Act of Parliament means; and the section introduces the express words "dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

Before I actually go to the section itself I will deal with the cases on which the Court of Appeal relied—namely, *Peart* v. *Bolckow, Vaughan & Co.* (2) and *Kennedy* v. *Horden Collieries.* (3) I say at once that, so far as the results of these cases are concerned, I think they were quite rightly decided.

In *Peart* v. *Bolckow, Vaughan & Co.* (2) the facts were that the father earned 3*l.* 11*s.* a week, plus free house and coals.

(1) [1900] A. C. 358. (2) [1925] 1 K. B. 399, 414, 417.
(3) [1925] 2 K. B. 438.

Another boy earned 1*l*. 0*s*. 6*d*. and the deceased 15*s*. 3*d*.; the mother and a younger son earned nothing. The county court judge had found as a fact that the deceased made a contribution to the necessaries of life of the family, and the Court of Appeal upheld that finding. The real argument before them against the judgment of the county court judge rested on the calculation that if you took the whole money as representing the family purse, then the amount per capita available for maintenance was greater after the accident than before. That mere calculation they held could not be held conclusive.

But in their comments upon the statutory clauses the learned judges all agreed that the effect of the statute was to restore the law of *Simmons*. (1) Warrington L.J. expressly reserved the question that might arise when he said: "He (the county court judge) arrived at the conclusion that the sum of 15*s*. 3*d*. which the boy contributed to the joint expenses of the household exceeded that which was necessary for his own personal maintenance, and there was, therefore, a contribution to what the learned judge calls the 'family purse'; that, however, may not be enough, because the amount of the family purse might, in certain cases, be so great that the small contribution which the boy makes to it could not be said to be a contribution for the provision of the ordinary necessaries of life, but that is not the case here."

There is, however, a sentence in the judgment of Scrutton L.J., which, with deference to that learned judge, has, I think, had somewhat disastrous consequences. He said: "Now in my view the proper direction for a county court judge is that he has to consider whether at the time of the death the alleged dependant was receiving a net balance of advantage from the deceased's contribution, that is to say, in the case of a father and son, whether after defraying the expense of maintaining the son the father had a balance of the contribution available for the provision of ordinary necessaries of life for himself and the rest of the family."

(1) [1899] 1 Q. B. 1005.

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This use of the words "available for" as a substitution for the words of the statute "dependent on" is the root, I think, of much erroneous argument that has followed.

Then *Kennedy* v. *Horden Collieries.* (1) Here again the actual judgment is most easily supported. The learned county court judge made some very sensible remarks in regard to what might be considered the standard expenditure in certain classes. And then on the facts of the case he said this: "We get a sum of 4*l.* 15*s.* for four of them, which works out at 1*l.* 3*s.* 9*d.* per head. Was this more than was required to supply the ordinary necessaries of life suitable to the father's class and position, bearing in mind that they had their house and fuel free? The mother states in effect that they were unable to save anything out of it." That finding duly determined the case. But then, unfortunately as I think, the learned county court judge proceeds to make an obiter remark: "If they had, in effect, put something aside, I do not know that it ought to tell against them; for it does not necessarily follow that because a man makes some provision for his widow in the event of his dying before her, and for his own old age, his income is therefore more than sufficient for his needs. It may, I think, be fairly argued that it is a man's duty in the present day to make, if he can, such reasonable provision for the future as will ensure that neither he nor his widow will become a burden on others or the public, and that therefore such reasonable provision ought to come under the head of 'necessaries.'" This pronouncement is curiously out of line with what he had previously said that "necessaries" should be construed as that word had been construed in connection with the contracts of infants; but this remark found favour with the Court of Appeal in this case, and their judgment, if analyzed, comes to this, that they have set aside the award and remitted to the county court judge in order that he might make an allowance for saving, and then see how the figures stand. In *Kennedy's* case (1) there was no such question involved. Atkin L.J. seems to have scented trouble ahead, but saw, as he was well

(1) [1925] 2 K. B. 438, 444.

entitled to do, no difficulty in the case in hand. For he says that the county court judge had found in fact that the whole of the family income was spent on necessaries, and that a balance of the deceased's income formed part of income expended.

Now, going to the section itself, I confess I think the matter could not have been more clearly expressed. You are to find out what such a family budget fitting to the class and position would naturally be. I agree that their actual expenditure is a prima facie guide. And I agree that there is no meticulous distinction between an absolute necessary and an article of comfort or a luxury. You are not to say that bread and butter is a necessary, but that if jam is added it is a luxury. But you are to take the necessaries of life. The expression is a common well understood expression. It indicates food, clothing and shelter and the necessary concomitants thereto. But to extend it to such a thing as saving, or what is the same thing, insurance, is, in my opinion, to do utter violence to the expression. And, though the learned Master of the Rolls says that he does not wish to say anything that would discourage thrift, I am afraid that I must reply that it is not allowable to encourage thrift by wresting a word used in a statute from its ordinary and natural meaning. If the true view was that any balance which came after a man's keep was "available" for necessaries, and that that was enough, why should there be any question of necessaries at all? All money that any one gets is available for necessaries just as it is available for anything else.

I am therefore of opinion that the judgment of the Court of Appeal was wrong. I think the learned county court judge determined on the facts that here the family had enough for the necessaries of life without any contribution—if indeed there was a balance—from the deceased, and that the remit if carried out would have directed him to consider items of expenditure which he had no business to consider.

I may, just in passing, take notice of one suggestion made by Mr. Montgomery for the respondent. He suggested that

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a judgment against him would mean that when there was a capital sum invested which represented savings, then so long as that capital sum was unexhausted there could be no contribution. I do not look on that as a commonsense suggestion. What is to be looked at is the family income, and income does not represent the touching of capital.

I move that the appeal be allowed and the decision of the county court judge restored; the respondents to pay the costs in this House and in the Courts below.

My Lords, I am authorized by my noble and learned friends, the Lord Chancellor and Lord Phillimore, to say that they concur in this judgment.

LORD ATKINSON. My Lords, I have had the privilege and advantage of reading the judgment of my noble and learned friend which has just been delivered, and I entirely concur in it.

LORD CARSON. My Lords, in the case of *Fife Coal Co.* v. *M'Arthur* (1) recently heard by the House of Lords and in which I myself took part, the construction of s. 4, sub-s. 2, of the Workmen's Compensation Act, 1923, was very carefully considered, and the authorities examined in an exhaustive judgment delivered by my noble and learned friend Lord Dunedin, and in which the noble and learned Lords who heard the case concurred. The section enacts as follows: "A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." In the case referred to my noble friend quoted with approval a passage from the work of the late judge Adshead Elliott on compensation, explaining the scope of the section in question, and which runs as follows: "Since the passing of the Act of 1923 it would seem, in order to establish partial dependency, the applicant must not only show that he has sustained pecuniary loss by reason of the

(1) 19 B. W. C. C. 461; [1926] W. N. 333.

death of the deceased workman, but must go further, and show that he relied partially on some or all of the amount which he has so lost in order to provide himself with the ordinary necessaries of life suitable to his class and position." In the present case the learned and experienced county court judge held that no dependency was proved, and, as far as I can understand the facts, he had ample evidence for coming to that conclusion—which being a question of fact, this House ought not to interfere with unless for sufficient reason. It is true that from the note of the learned county court judge, he seems to have drawn an inference that the parents of the deceased workman derived pecuniary assistance from the contributions of the deceased over and above what was necessary to keep the son in food, clothes and pocket money, but assuming that such inference was correct, that was not sufficient, having regard to the terms of the section and the decision of this House already referred to, to prove that some or all of the amount so lost was relied upon to procure the ordinary necessaries of life suitable to their class or position. I am unable to follow the reasoning of the Master of the Rolls and the Lords Justices in the Court of Appeal in finding reasons for remitting the case to the county court judge on the hypothetical grounds that the latter may have misdirected himself in holding that the respondents were not dependants, because some of the money contributed may have been saved.

My Lords, I think the words of the section are clear and well understood, and I can find no sufficient grounds for construing the words "ordinary necessaries of life" as including pecuniary advantage which was applied not for the maintenance of the family but for such purposes as the parents might desire to apply it. My Lords, with great respect for the Master of the Rolls, I do not think we gain any assistance by considering questions either of the preventing or the encouragement of thrift, which are more appropriate for the Legislature than for an appellate Court.

My Lords, I agree that this appeal should be allowed,

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and the decision of the county court judge restored and that the costs should be paid as proposed.

Order of the Court of Appeal reversed and award of the county court judge of Glamorganshire restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the county court to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 14, 1927.

Solicitors for the appellants: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

Solicitors for the respondents: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

[HOUSE OF LORDS.]

H. L. (E.)* 1927 *July* 26. BAKER . . . . . APPELLANT;

AND

ARCHER-SHEE . . . . . RESPONDENT.

Revenue—Income Tax—Foreign Securities, Stocks and Shares—Foreign Possessions—Trust Fund—Dividends not remitted to the United Kingdom—Foreign Trustees—Balance of Income paid to British Beneficiary—Liability of Beneficiary to Income Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV., r.* 1; *Case V., rr.* 1 *and* 2.

A testator, a citizen of the United States, left the residue of his property in trust for his daughter during her life. The trustees, who had full power over the investment of the trust fund, were a company constituted under the law of the State of New York and resident therein. The trust fund consisted of foreign Government securities, foreign stocks and shares, and other foreign property. The trustees paid over such of the sums they received as they considered to be income, after deducting expenses, to the order of the daughter at a bank in New York. No part of the income was remitted to the United Kingdom. The respondent who was the husband of the testator's daughter and resident in the United Kingdom, was assessed under Case IV. of Sch. D in the full amount of the income of the trust:—

Held (by Lord Atkinson, Lord Wrenbury, and Lord Carson; Viscount Sumner and Lord Blanesburgh dissenting), that the daughter was

* *Present:* VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, LORD CARSON, and LORD BLANESBURGH.

specifically entitled under the will in equity during her life to the interest and dividends of the securities, stocks, and shares comprised in the trust fund, and that consequently her husband was assessable under Case IV., r. 1, and Case V., r. 1, to income tax in respect thereof (except such, if any, as were shown to be "foreign possessions other than stocks, shares and rents") whether such interest and dividends were remitted to the United Kingdom or not; but that the matter should be remitted to the Commissioners to state which of the items of the trust fund were (1.) "securities" within Case IV., r. 1, (2.) "stocks, shares or rents" within Case V., r. 1, and (3.) "possessions out of the United Kingdom other than stocks, shares or rents" within Case V., r. 2.

Decision of the Court of Appeal [1927] 1 K. B. 109 reversed.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J. (1) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully stated in the report of the case before Rowlatt J. and the Court of Appeal.

1927. Feb. 14, 15, 17. *Sir Douglas Hogg A.-G.* and *Reginald Hills* for the appellant. Upon the true construction of the will the respondent's wife is the sole beneficial owner of the interest and dividends of the securities, stocks and shares comprised in the trust fund, and is entitled to receive such interest and dividends. Upon the principles of income tax law which apply to the chargeability of income subject to the trusts of a will, as laid down in *Williams* v. *Singer* (2), the person owning the income and assessable to tax in respect of it is the person beneficially entitled thereto and not the trustee in whom such income may be legally vested, except in so far as the trustee may be assessed on behalf of the beneficiary. *Williams* v. *Singer* (2) was the converse of the present case; it was a case of trustees in England and a beneficiary abroad. In that case no point arises from the fact that the dividends were paid direct to the beneficiary, for in *Pool* v. *Royal Exchange Assurance* (2), which was decided at the same time, this was not so. It was said by the Court of Appeal that the moneys which the wife received were not moneys from foreign securities, and that the income which she received had lost its origin and parentage by reason of the administration of the fund by the trustees. But what

(1) [1927] 1 K. B. 109. (2) [1921] 1 A. C. 65.

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the income arises from depends upon the trusts of the will, and the fact that it passes through the hands of trustees does not alter the fact that it is income arising from foreign securities. In *Lord Sudeley* v. *Attorney-General* (1) the point of the decision was that at the crucial time the residue had not been ascertained, and therefore the only right of the beneficiary was to have the estate administered. That case therefore does not affect the appellant's argument. It was applied to income tax purposes in *Barnardo's Home* v. *Special Income Tax Commissioners*. (2) Here it is not true to say that these trustees were not trustees of this income for the respondent's wife. The fact that they are entitled to be recouped their proper expenses does not alter the fact that they hold the income in trust for her. The appellant makes no claim for tax on any sums rightly deducted by the trustees before making payment to the wife's bank in New York.

Maugham K.C. and *Edwardes Jones K.C.* for the respondent. The true nature of the gift in this will is such that the tenant for life is not entitled to the actual income of any specific investment. The trustees may take their expenses out of any part of this income. This lady is entitled to the totality of the net income. There is no warrant in the Income Tax Act for saying that she is entitled to the income of so much shares and so much securities in specie. She is not entitled in specie to the income of any one item of investment, but she is entitled to have the same accounted for. The right of the trustees to their expenses is not as her agent. Where a trustee incurs expenditure as the trustee of a settlement he does not incur it on behalf of the tenant for life, but on behalf of all the parties interested: *Barnardo's Homes* v. *Special Income Tax Commissioners*. (3) The income is to be ascertained after all proper deductions in due course of administration. This is not a case of a specific settled legacy, but a gift of residue. There are three categories of income: shares, securities and foreign possessions. These are all pooled, and out of the pool the trustees deduct the expenses of administration.

(1) [1897] A. C. 11, 18, 21. (2) [1921] 2 A. C. 1, 8.
(3) [1921] 2 A. C. 9.

This lady is entitled to a balance, and the question is what is the balance for income tax purposes? Under Case IV., r. 1, no right is given to deduct from the return a single penny for costs, charges and expenses. All that this lady is entitled to is the result of an account, and that must be regarded as a foreign possession. In *Williams* v. *Singer* (1) the question was not as to the property to be taxed, but as to the person. *Murray* v. *Inland Revenue Commissioners* (2) supports the respondent's contention. And see *Fry* v. *Shiels' Trustees.* (3)

Reginald Hills in reply. A trust fund as such is not a source of income and is not chargeable to tax; the constituent elements of the fund must be looked at.

[He referred to *Brooke* v. *Inland Revenue Commissioners.* (4)]

The House took time for consideration.

1927. July 26. VISCOUNT SUMNER. My Lords, in this case the respondent was assessed by Additional Commissioners in respect of the income tax years 1923–4 and 1924–5. His appeal to the Special Commissioners failed. Their decision was in turn affirmed by Rowlatt J., but was set aside by the Court of Appeal. Hence the present appeal.

The respondent's wife was born in the United States. Under the will of her father, Mr. Alfred Pell of New York, she is entitled, as tenant for life, to the income of a considerable estate now held in trust by the Trust Company of New York. So far as concerns the present appeal it is in respect of his wife's interest under this trust that the respondent is charged with tax.

Para. 2 of the case of the appellant, the Inspector of Taxes, runs thus: "The question arising in this appeal is whether for income tax purposes the income of foreign securities, held by the trustee of a foreign will resident abroad upon trusts, which entitled the respondent's wife to the income during her life, belonged to the respondent's wife so as to be chargeable to Income Tax under Case 4 of Schedule D of the Income Tax Act, 1918, whether such income was remitted

(1) [1921] 1 A. C. 65, 75.
(2) 1926 S. L. T. 714; (No. 245, Tax Cas.).
(3) (1914) 6 Tax Cas. 583; 1915 S. C. 159.
(4) [1918] 1 K. B. 257.

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to the United Kingdom or not." In different words the respondent's case states the question to the like effect, and counsel so argued it on both sides.

The case stated sets out the relevant sections of the will. In the events which happened, the whole income and profits of the trust estate were to be applied to the use of Lady Archer-Shee during her life. The trust fund consisted, in the years now in question, of foreign Government securities, foreign stocks and shares, and other foreign property. The case stated says: "During the three years ended 5th April, 1925, the appellant was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use."

So far it merely follows the will. It proceeds: "The Trust Company of New York have paid over such part of the sums, which they received from the said fund, as they considered to be income, as the same accrued to her, to her order at Messrs. J. P. Morgan & Company's Bank in New York, while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law."

This is, in effect, a finding that no profits or gains accruing in specie from any particular trust investment have been paid to Lady Archer-Shee at all. The trustees have throughout retained the receipt and control of the income from all sources. Your Lordships were told by the respondent's counsel, without contradiction, that the sums actually paid to Messrs. J. P. Morgan & Co. for Lady Archer-Shee's account were not remitted to her in this country, but were spent by her in the United States, and it has been the appellant's contention throughout, as the case stated recites, that the income arising from the trust property was taxable here, whether actually remitted to the United Kingdom or not. In truth the issue, as raised, is independent of the proportions, in which the trust fund is made up of securities, shares and other foreign possessions, and this is no doubt the reason why the Commissioners, with the concurrence of both parties, have thought it unnecessary to define those proportions.

There is no finding as to the law of the State of New York and, in accordance with the settled rule, we must presume that the general law of New York which is here relevant—namely, the law of trusts and wills—is the same as our own. How far any such presumption arises with regard to statutory law and particularly to revenue statutes is another matter. I am sure no well-wisher of the State of New York would willingly suppose that the income tax law there prevailing is expressed in the same terms as our own.

Though the Attorney-General conceded at your Lordships' Bar that tax should not be claimed on any sums rightly deducted by the trustee before making payment to Lady Archer-Shee's New York Bank, I still think that the Inland Revenue is logically committed to its original contention that, because she is the beneficiary for life under a trust vested in a New York trustee, she is now chargeable to English tax in a greater measure than if she had made these investments herself and had owned them absolutely at law, instead of being merely beneficially entitled to their income for life in equity. This broad contention is variously expressed—namely, (*a*) that the respondent was rightly assessed in respect of income arising from "securities out of the United Kingdom belonging to his wife" (Reason 1); (*b*) that the income of the securities, forming part of the trust fund, "belongs to the respondent's wife" (Reason 2); and (*c*) that it arose from the specific investments, which constituted the trust fund, and must be charged upon the husband accordingly "in the full amount, whether actually remitted to this country or not." Accordingly we have to consider two kinds of question, (*a*) does the income of a trust fund "belong" to the beneficiary, so that the beneficiary is chargeable as if it arose and accrued to him directly as his, and, if so, (*b*) is the amount so chargeable the gross amount paid by way of interest or dividend on the investments, or only the net amount received by the beneficiary after deduction of the tax and other charges, which the trustees have necessarily to pay out of the gross income of the trust fund, which comes to them?

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My Lords, the position of the equitable tenant for life and of the investments which form the trust fund, is so clear, both in law and equity, that, apart from any special prescriptions, express or implied, of the law relating to income tax, there can, I think, be no doubt about them.

The trustee has the full legal property in the whole of the trust fund and the beneficiary has not. Apart from special provisions in particular settlements, which do not affect the general principle, the trustee is not the agent of the beneficiary, who can neither appoint nor dismiss him. She cannot require him to change or forbid him to change the particular investments of the fund. There is no liability on the beneficiary for the trustee's acts on the principle of respondeat superior and, unless the trust deed otherwise provides, the trustee must act without remuneration to himself and cannot in any case sue the beneficiary on any implied promise to pay. It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of a Court of equity to enforce the trust and to compel the trustee to discharge it. This right is quite as good and often is better than any legal right, but it is not in any case one, which for all purposes makes the trust fund "belong" to the beneficiary or makes the income of it accrue to him eo instanti and directly as it leaves the hand of the party who pays it. I do not understand that, so far, there was any contest. The appellant's argument is that, whatever may be the legal position of the capital and the equitable position of the trustee and the cestui que trust as regards the right to the income, for income tax purposes the law is otherwise, and that under the Income Tax Act and by virtue of some implication the "accrual" is to the beneficiary.

I put aside the contention that, if the respondent is not held liable, trustees will be liable to super tax on trust funds and beneficiaries will be outside the benefit of exemptions from tax. It is not in this indirect way that the general law

can be set aside for the convenience of the revenue. Super tax and exemptions depend on the sections, which impose or confer them, not on some supposed incidence, arising argumentatively from provisions as to the subject-matter, which attract tax, or as to the extent of it. Super tax is chargeable in respect of the income of an "individual" from all sources. Even in the easiest case of a trustee to accumulate income, no one would say that his trust was a "source of income" to him as an "individual," for in the case of several trustees they are not "an individual" at all. The case of exemptions is similarly dependent on the construction of the relevant section.

It is not a private instrument like a will that can determine the question whether a fund is taxable or whether Lady Archer-Shee is chargeable in respect of it. That turns on the legislation, which deals with her rights, legal or equitable, for the purposes of taxation. It follows that it is in the terms of the Income Tax Act or in some decided construction which binds your Lordships, that the inland revenue can alone find authority for the present contention, that the person "entitled to" the income is the beneficiary, and a rule of "income tax law," which so completely and uncompromisingly disregards the regular law of trusts and the ordinary law of property, is one that must be enacted beyond doubt or question.

The scheme of the Act is that income is taxed, that is income which somewhere has been received, and that persons are assessed to the payment of that tax. The income taxed and the charge upon it are, or should be, expressly and uniformly described on definite principles, but assessment is a matter of convenience, now on this plan and now on that. There is a good deal of practical advantage in tax-gathering on this indefinite scheme, but all the same the advantage must be taken cum onere and, if the right to charge and to assess is not to be found in the Act either in express terms or by necessary intendment (including what is called "the scheme of the Act"), the Crown fails. I have looked without success for either express words or a necessary implication, that would enable the revenue to tax a subject, who is only

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an equitable tenant for life, as if she was both the beneficiary and the trustee in one, or to claim that securities and shares belong to her, as to which she has only a right to compel the administration of the trust. The Rules applicable to Case IV. and r. 1 of those applicable to Case V. of Sch. D clearly apply to legal owners and, if words properly apt to charge them are also to charge equitable owners, it can be done only by ignoring the difference in this matter between law and equity.

On the argument for the appellant that the equitable tenant for life of the income of this trust estate may be directly chargeable there are two separate questions, (*a*) whether she can in any case be chargeable in respect of the difference between the gross income of the trust and that net income, which the trustees properly retain, and (*b*) where, as is here the fact, the whole fund and the income of it are abroad, can she be chargeable at all, in respect of income arising from foreign possessions other than securities, stocks, shares or rents, which is not remitted to the United Kingdom ? The first question would equally affect the case, where fund, trustee and beneficiary are all here ; the second arises only where there is property abroad. It does not seem to matter whether the income aimed at is said to arise from or to accrue to or to belong to this or that property or person. In the present case, where the person assessed can only be the beneficiary or her husband for her, authority has to be shown for taxing her in respect of something that is not here and that she does not get. In others, however, the position of the trustee would arise for consideration, if the trustee were here.

I do not know of any provision, which, clearly or at all, imposes either collection at the source or vicarious liability on a trustee, as such, as against the beneficiary, and in the case of foreign possessions, which is this case, there are express provisions to the contrary. The debatable question is generally one of the person to be assessed, without deciding anything about ownership or its rights. There is, however, no question here as to the person to be assessed ; he must be Sir Martin Archer-Shee. Counsel for the Inland Revenue pointed to no authority that made his liability depend on anything

but the nature and extent of his wife's right to the property which is charged.

In the present case it happens that the settlement is in the simplest form. There is only one tenant for life and, during her life, there is no other object of the trust to be considered. We hear of no matters in which a conflict between income and capital and their respective interests has arisen, nor of any business carried on by the trustee, as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income; if there had been reversioners, who could claim that part of the annual receipts were in the nature of accretions to capital; if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors, the impracticability of saying that any or all of the beneficiaries entitled to income owned the whole or any part of that income from the moment it became payable and was paid and to the full extent of the amount paid, would be evident. The same rule of "income tax law" must, however, be applicable to all these cases. No doubt it is true that an accountant could always more or less simply appropriate certain fractions of each incoming and each outgoing to each object of the trust in a uniform proportion. That, however, is done by making assumptions which may not correspond to the facts, and by computing accordingly. The trustee may in his discretion pay one beneficiary out of the money collected from a security, another out of a payment of rent, and a third out of the profits of a business. He may, on the other hand, if he thinks fit, pay everything received into one account and then draw on that account generally in favour of each beneficiary. In either case it is plain that no specific dividend or interest payment "belongs" in any proper sense of the word to any particular beneficiary. The distribution rests with the trustee, so long as he complies with his duties. A series of accounts could be made out between the trustee and each beneficiary crediting the latter with a fraction of each item of income

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and debiting him with a fraction of each item of outlay, in such a way that, on aggregating all the separate accounts, the debits and credits would exactly correspond to the trustee's general account of his trust. Similarly, by appropriation of payments in the trust bank account, the source out of which any given payment was made can be calculated. Neither process shows anything material to the nature of the beneficiary's right. They both go only to the measure and discharge of it in money.

The fact appears to be that it has all along been the policy of the Legislature in regard to income tax to keep aloof, as far as possible, from questions of title and to confine itself, as far as possible, to questions of administration. Money within the United Kingdom is taxed where it is most conveniently found, and though that is prima facie in the hands of its owners, in a vast number of cases it is otherwise. Collection at the source is effected by express provisions, which enable specified persons to pay the tax thereon to the Revenue direct and in the first instance, and authorize them to deduct it against another person who is placed under a statutory obligation to allow it; e.g., under Schedules A and C, and No. 20 of the General Rules. As Lord Cave says in *Blott's* case (1), a company pays as taxpayer and then deducts; it does not pay as agent for the shareholder. Where the person to whom the money belongs is out of the country, his agent, who is here and handles the money, may be taxed for him. In some cases, mostly similar to this, the assessment and charge are made on the trustee here for the beneficiary abroad. Nothing in this scheme catches the taxpayer, who is in the United Kingdom and whose trustee and trust fund are not.

On suitable occasions the Act deals expressly with the respective positions of trustee and beneficiary and distinguishes between legal and equitable ownership, e.g., s. 37 (i.) (*a*), "hereditaments belonging to any hospital . . . . or vested in trustees for charitable purposes"; s. 103, sub-ss. 1 and 3, in which the case of a trustee "who has authorized the receipt of trust property by the person entitled thereto," is

(1) [1921] 2 A. C. 171.

distinguished from that of an agent or receiver, and also from that of a person, who, in whatever capacity, is "in receipt of . . . . profits or gains . . . . of or belonging to any other person, who is chargeable in respect thereof." Sect. 54, sub-s. 4, and Sch. C, General Rule No. 2 (*d*) proviso, make express special provisions for substituting the acts of beneficiaries for the action of trustees, which would in general be alone material, and, in one single case, for the "elimination" of the trustee as owner of the trust securities and the substitution of a beneficiary, who, in that single case, is to be "deemed" to be the person owning the securities, which, in general, of course he is not.

I come now to the decisions which were supposed to be in point. The appellant contended epigrammatically that "for income tax purposes the trustee is eliminated," a contention, which goes far and unwarrantably beyond the words of the Act. The authority, on which it was rested, *Williams* v. *Singer* (1), turned on the question, whether or not the trustee, resident here, was chargeable. The fund was abroad, and he had authorized the beneficiary, who was abroad also, to collect the income abroad where it arose. The difference between legal and equitable rights only came in question because it enabled the Inland Revenue to argue that the legal owner alone was chargeable and that the income must be deemed to have accrued or arisen to him, that is to say, here. There is no such contention in the present case, nor was the distinction between the gross amount collected by a trustee and the net amount duly distributed by him to the beneficiaries one which arose on the facts of *Williams* v. *Singer*. (1) The decision of the House was that the trustee was not chargeable to tax here, and sundry expressions used, to the effect that the beneficiary resident here is chargeable, are only correlative to the ratio decidendi in its actual form, and have no reference to the questions now in debate. Again the case of *Lord Sudeley* v. *Attorney-General* (2) is said by Sargant L.J. to be in its general reasoning precisely applicable. The points referred to there

(1) [1921] 1 A. C. 65. (2) [1897] A. C. 11.

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were, first, the local situation, for the purposes of English taxation, of an equitable right to have an estate administered, in which the testatrix was interested as a residuary legatee at the time of her death, and, second, the question, whether for such taxation her interest was to be deemed to be confined to a specified fraction of the residuary estate, corresponding to her share under her husband's will, or extended to the whole of that residuary estate. In applying this to the present case the learned Lord Justice says, that Lady Archer-Shee has not any specific right to any particular item of income, but, following Lord Herschell's reasoning, only an equitable right to have handed over to her the net income of the estate, subject to all proper deductions, which right of hers is a form of property situate in New York, in whose Courts it would have to be asserted. I think the reasoning of this judgment is correct. It is immaterial that in *Lord Sudeley's* case (1) the estate of the husband of the testatrix had not yet been administered, whereas here, no doubt, this has been long ago accomplished. Nobody at any rate has argued the contrary, and the point does not need discussion. Furthermore, the Rules of Case IV. of Sch. D, which are applicable on this occasion, say expressly that, where no money has been remitted to this country, the taxpayer here is not chargeable in respect of foreign possessions, other than stocks and shares, securities and rents. Lady Archer-Shee, for the reasons already given, does not, for income tax purposes, in my view own and is not entitled to any of the stocks, shares, securities or real property that form part of the New York trust estate. These belong to the trustee company, to whom also the annual payments made in respect of them, by way of rent, interest or dividends, "arise," "accrue" and "belong." All that she has is a right, in the forum of the trustee and of the trust fund, to have the trust executed in her favour under an order to be made for her benefit by the appropriate Court of equity, and this "possession" neither consists in the trust's investments or any of them, nor is situated here. It is "foreign."

I am therefore of opinion that the appeal fails. I attach

(1) [1897] A. C. 11.

no importance to the obvious slip, made in one of the judgments in the Court of Appeal, as to money having been remitted to Lady Archer-Shee here, and I need say no more about it, as I do not think that it affected the reasoning of the judgment appealed from.

LORD ATKINSON. My Lords, the testator in this case, Alfred Pell, the father of Lady Archer-Shee, in the sixth section of his will dated May 4, 1899, directed that all his real and personal estate, except what was thereinbefore disposed of, should be held in trust by his executors and trustees, that they should, during the life of his wife, apply two-thirds of the income and profits thereof to her use, and the remaining one-third to the use of his daughter, or any issue she (i.e., his wife) might leave her surviving. He then provided for the event which has in fact occurred in these words: "In the event that my said wife shall die leaving no issue by me her surviving the whole of the said income and profits shall thereafter be applied to the use of my daughter Frances during her life."

The testator then by section 9 of his will appointed his wife and John Pierpont Morgan, Junior, to be executors of his will and trustees of all the trusts created or declared thereby. He gives his executors the very widest powers of dealing with, selling, investing or disposing of his real and personal estate, and changing any of the investments upon which any portion of it might be invested. He further provided that in case the executor, John Pierpont Morgan, Junior, should decline to qualify, or act as an executor or trustee under his will, or should die, resign or become incapacitated, he authorized his wife, or in case of her death or incapacity his daughter, Frances, to nominate and appoint some trust company organized under the law of New York State as executor and trustee in his, Pierpont Morgan's, place or stead, such appointment to be made in writing and duly acknowledged by her, and to be filed in the office of the Court in which his will had been proved. The trust company so appointed was to become one of the executors and trustees

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of his will, and was to perform all the duties, and have all the powers, authority and discretion as if it had been appointed by his will. This last provision is curtailed by that which follows in section 10. By this latter section he confers upon the trust company power to retain any investment of which he was seised or possessed, and also the power to invest and reinvest his estate in any securities which might be approved of in writing by his wife or daughter and by the said trust company.

It is found in the case stated that the testator died before the year 1904, and that his wife also died in that year. Mr. Pierpont Morgan, Junior, on her death became the sole trustee and executor under the testator's will. This gentleman seems to have occupied that position for a period of about ten years; presumably he discharged the duties belonging to it till he retired in the year 1914. Sargant L.J., in giving judgment, said (1): "No importance is to be attached to the fact that the trust fund in this case was originally formed or was derived from a residue, because having regard to the date at which the testator must have died, we must assume that the estate has been quite fully administered long ago, so that here we have a definite and specific trust fund." I quite concur, but may one not justly assume that the words "long ago" extend to the year 1914, when Mr. John Pierpont Morgan terminated his ten years' administration of the estate? It would be strange indeed if a business man like him, who, unless he belies his name, is skilled in financial affairs, should not have completed the work of this administration in that length of time. If he had done so it would have furnished a reason for his retirement. Then, when he did retire, one finds this young lady, Miss Pell, who, it is contended, has now no property in or rights to this fund beyond the right in equity, by suit presumably, to compel the trust company to pay to her the portion of the income to which she is entitled, dominating the situation, and by written instrument duly acknowledged and filed in the Court named, appointing not a named company but some company—i.e., some company

(1) [1927] 1 K. B. 127.

which she may select to fill the office of executor and trustee instead of Mr. John Pierpont Morgan, Junior, retired. The choice is left with her. In addition, her powers and responsibility are not ended there. She has, under section 10 of the will, power over the investment and reinvestment of her father's estate in any securities, in that her consent is necessary for any such operation. I think it is not an unreasonable inference from these matters that the life interest given to her by her father's will had become vested in her, and that the trust company which she had appointed were merely her agents to administer the fund for her and in her interest. If that be so, payments necessarily made properly in the administration of the fund are made in her interest and on her behalf, and, in my view, are made with her money.

The learned Master of the Rolls is in error in supposing that the trust company remit what they receive from the trust fund or any portion of it to the respondent in this country. That is evident from the following paragraph in the case stated :—

" In the year 1914 the said J. Pierpont Morgan, Junior, resigned the trusteeship, and under the power conferred by section 9 of the said will the Trust Company of New York, being a company constituted under American law and resident in the State of New York, was appointed to be executor and trustee of the will. The fund constituted under section 6 of the will consisted of foreign Government securities, foreign stocks and shares and other foreign property.

" During the three years ended 5th April, 1925, the appellant was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Company of New York have paid over such part of the sums which they received from the said fund as they considered to be income, as the same accrued to her order at Messrs. J. P. Morgan and Company's bank in New York while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law."

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But even with that correction I am unable to understand what precisely is meant by the two following passages in the judgment of the Master of the Rolls. (1) They run thus : (1.) " It appears from that statement of fact that what they remit is not what I will call the *dividends in specie* in their actual form ; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. They do not remit the whole of the income from the profits, but they remit a sum which has lost *its origin or parentage ;* it has lost the shape of dividends, share warrants, or the like, and is merely a sum of money which represents the balance after payment of the sums which would properly fall upon the trust." (2.) " But is this sum income arising from securities ? In *Singer* v. *Williams* (2) it was decided that shares in a foreign trading company are foreign possessions and are not foreign securities within Case IV. of that schedule, and the present Lord Chancellor gave an indication or definition of what is the meaning of the word ' securities.' This lump sum of money, this balance, does not appear rightly to fall within the words of Case IV., r. 1, as income arising from securities. Exactly what those securities are it is unnecessary at present to define or to determine, but from what I have already said it is plain that this balance has lost its original character as being dividends from debentures or shares or the like, and it appears to me that it does not fall within Case IV., r. 1, as income arising from securities."

The trustees undoubtedly do not remit to the beneficiaries the income of the fund in specie, if that means, as I suppose it must mean, forwarding to them the dividend warrants, cheques, and such like things received by them in payment of what are debts due to the fund. It would be unbusiness-like and ridiculous to do so. What the trustees properly and rightly do is to cash those dividend warrants and cheques, etc., and pay into the bank of the beneficiaries the money they thus receive. If the trustees paid into the bank of the beneficiaries all the income of the fund which they received,

(1) [1927] 1 K. B. 120, 122. (2) [1921] 1 A. C. 41.

retaining nothing, I assume, on the reasoning in these paragraphs, there would be no loss of origin, no loss of "parentage," of any portion of the sums paid in. If that be so I am utterly unable to understand how the retention by the trustees in their own hands of a portion of the income which they receive in order to pay lawful claims upon the fund, and charges which probably the lady herself would have had to pay or get paid for her, if she was resident in New York, and which the trustees will have to account for fully, can change the "origin or parentage" of the residue of the income received, lodged with the bankers of the beneficiaries. This residue has no doubt lost the shape of dividends, share warrants or the like, but so would the entire income of the fund if it had been lodged in the same way with the appellant's bankers.

On the first of those two paragraphs it would appear to me as if nothing can preserve the true character and origin and parentage of the income paid to the beneficiaries through their bankers unless that be done by lodging with those bankers the dividends, share warrants and the like received by the trustees but not cashed. With all respect I am quite unable to concur in this reasoning. I think it misleading.

An idea similar to that expressed in the two passages quoted from the judgment of the Master of the Rolls seems to me to underlie the following passage from the judgment of Warrington L.J., as he then was. The passage runs thus (1): "They therefore found that the income arising or accruing to this lady in the present case is not the actual income derived from the various sources of investment, but that it is such sum as the trustees from time to time considered to be the income, while retaining in their hands the sums which are referred to in the finding of the Commissioners." This passage would appear to indicate that in order to satisfy the word "accruing" or "arising" to the lady the trustees should remit to her all the dividend warrants, cheques received by them, and such like, in payment of the income, with the consequence I have already mentioned. The lodgment of

(1) [1927] 1 K. B. 126.

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the entire income with her bankers would not apparently satisfy these words, or if it would, how and why the lodgment of 95 per cent. of the income, 5 per cent. being retained to satisfy some lawful claim upon the fund, which the beneficiary, if she was resident in New York, would probably have had to pay would not satisfy them I cannot understand. The trustees do not, I think, properly speaking, consider what is to be the income the beneficiary is entitled to receive. They lodge the whole income, less what they consider it is necessary to retain to discharge lawful claims upon the fund. I am unable to follow the reasoning that leads to the conclusion that, by the deduction of these sums, the character of the balance lodged changes, and acquires a character different from what the entire income would have borne if it had been lodged.

Sargant L.J. expresses his view of the case in the following passage (1): "The learned judge has summed up the position, in my judgment, perfectly accurately in a passage of his judgment which I will now read. He says this: 'What this lady enjoys is not the stocks, shares and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all.'" He apparently considers that in that state of things the reasoning of the judges and the members of the House of Lords who took part in the case of *Lord Sudeley* v. *Attorney-General* (2) was applicable to this case. That case has been frequently referred to in the argument in this case, and consistently, almost, the important point decided is disregarded. That point was, that the claim upon or against the residue of a testator's property could not be enforced until the testator's estate has been fully administered, and the net residue, which might ultimately be nothing, ascertained. Sargant L.J. himself, states, that it must be presumed, owing to the lapse

(1) [1927] 1 K. B. 128. (2) [1897] A. C. 11.

of time, that the testator's estate has been fully administered. The remarks of the judges to whom the learned Lord Justice refers, have reference to the fact that the testator's estate had not been fully administered, and do not, it appears to me, help to the conclusion at which the learned Lord Justice has in this case arrived.

The evidence stated in the case stated is extremely scanty. It does not indicate with any particularity the sources from which the trust fund is derived, whether it be from foreign "Government securities, foreign stocks and shares, or other foreign property." I have had the pleasure and advantage of reading the judgment about to be delivered by my noble friend Lord Wrenbury. It is, I think, clear and convincing. I concur with him in his view of the case, and approve of the suggestion he makes as to a reference back to the Commissioners to restate the case by setting forth the particulars he has indicated.

LORD WRENBURY. My Lords, s. 1 of the Income Tax Act, 1918, enacts that income tax for any year "shall be charged for that year in respect of all property, profits, or gains described or comprised in the Schedules numbered A, B, C, D and E." I note here the words "all property."

Sch. D enacts that tax under that Schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (i.) to any person residing in the United Kingdom "from any kind of property whatever, whether situate in the United Kingdom or elsewhere." It further enacts that tax under the Schedule shall be charged under certain cases and after specifying five cases it adds :—

Case VI. "Tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule." No words could be more plain to include all annual profits of every kind.

In the case of a person residing in the United Kingdom therefore the tax is imposed upon *all property*, whether situate in the United Kingdom or elsewhere and whether described in any of the five cases or not.

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Case V., however, which relates to "possessions out of the United Kingdom," consists of two parts. The former has to do with "stocks, shares, or rents in any place out of the United Kingdom"—the latter with "possessions out of the United Kingdom other than stocks, shares, or rents." In the latter case the tax is to be "computed only on the full amount of the actual sums annually received in the United Kingdom."

The result of the above may be shortly stated by saying that in the case of a person residing in the United Kingdom all his property whatever, situate in the United Kingdom or elsewhere, is charged to tax, but if he shows that a particular part of his property is within Case V. (2.) then the tax is computed only upon so much of the income as is actually received in the United Kingdom.

In this case the taxpayer is a British subject resident in England. The property from which the income is derived is in America. The income is not remitted to this country. The case states that the income has been paid to Lady Archer-Shee's order at Messrs. J. P. Morgan & Co.'s bank in New York. It stops there, and does not go on to state that it has not been remitted by New York to this country but it is admitted at the Bar that this is the case. Under these circumstances the question is whether the income is such as that in that state of facts it is taxable to income tax.

The income in question is income of Lady Archer-Shee under a gift in the will of her father Mr. Arthur Pell of New York in the following terms: "I direct that all my real and personal estate except what is herein before disposed of be held in trust by my Executors and Trustees as follows . . . . (3.) that" (in an event which happened) "the whole of the said income and profits shall thereafter be applied to the use of my said daughter Frances during her life." Lady Archer-Shee is the said daughter Frances.

The date of Mr. Pell's death does not appear, but it was before 1904. It is not disputed that the estate has been fully administered. The Trust Company of New York have been appointed as and now are trustees of the fund, and it

is not disputed that the funds are now in their hands as trustees upon the trust above stated.

The securities, stocks and shares are liable to American income tax and the Trust Company of New York are entitled to commission or other payment for their services. Subject to these Lady Archer-Shee is during her life entitled to the income arising from the securities, stocks and shares and foreign possessions.

In this state of facts Lady Archer-Shee's interest under her father's will is beyond all question "property." The question for determination is what is the nature of that property, is it a "possession out of the United Kingdom other than stocks, shares, or rents" within Case V. (2.)? To escape taxation the respondent must establish that it is.

What, then, is the property to which Lady Archer-Shee is entitled? The will is an American will. The law of America is in an English Court question of fact. In the case stated by the Commissioners there is no finding as to what is the American law in the light of which the construction of Mr. Pell's will is to be ascertained. We have not heard that there has been any agreement between the parties on the point, and I have not traced that there has been any reference to it in the course of the proceedings. The members of the Court of Appeal do not appear to have considered the matter. They, and in particular Warrington L.J., seem to have treated the question for decision as purely a question of fact and, without any finding as to the American law as question of fact, they contented themselevs with referring to para. 4 of the case and founded themselves upon the statement that there is paid over to Lady Archer-Shee's account only such part of the sums which the trustees have received from the funds as they considered to be income. My Lords, the question is not what the trustees have thought proper to hand over and have handed over (which is question of fact) but what under the will Lady Archer-Shee is entitled to (which is question of law). The trustees, of course, have a first charge upon the trust funds for their costs, charges and expenses, and American income tax will be a tax which they would have to bear and which would fall upon the beneficiary.

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But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these. If an owner of shares deposits them with his banker by way of security for a loan he is not reduced to being the owner of a balance sum being the difference between the dividends on the shares and the interest on the loan. He is the owner of the equity of redemption of the whole fund. If a landowner employs an agent to collect his rents and authorizes him to deduct a commission he does not cease to be owner of the rents. Under Mr. Pell's will Lady Archer-Shee (if American law is the same as English law) is, in my opinion, as matter of construction of the will, entitled in equity specifically during her life to the dividends upon the stocks. If, say, in January 100*l.*, after deduction of American income tax, was received for a dividend and there was nothing owing to the trustees which they were entitled to deduct, Lady Archer-Shee could, in my opinion, call upon them to pay her that 100*l.* If such a property is not taxable it results that a person residing here (whether a British subject or not) can by creating a foreign trust of stocks and shares and accumulating or spending the income abroad escape taxation upon that income.

If the estate had not been fully administered I could well understand a contention that the right to whatever in administration might turn out to be the fund the subject of this gift was a " foreign possession," and fell under Case V. (2.). But that is not the case. I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company " to the use of my said daughter." It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is " property " from which income is derived.

The statute itself provides for deduction of income tax (see Sch. D, Cases IV. and V.); the commission payable to the Trust Company is a debt due from the beneficiary to

the trustee—neither the one nor the other is relevant to the title of the beneficiary as distinguished from the amount which the beneficiary is entitled to receive by virtue of her title.

The case does not give particulars of the sources of the income beyond stating that the fund from which it arises consists of "foreign Government securities, foreign stocks and shares and other foreign property" (Case, para. 3). "Securities" are the subject of Sch. D., Case IV. (1.). "Stocks, shares or rents" are the subject of Case V. (1.). Foreign possessions, other than stocks, shares and rents, are the subject of Case V. (2.). The first are taxable on the full amount arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject to deduction as there mentioned, including the deduction of any sum which has been paid in respect of income tax in the place where the income has arisen (in the present case American income tax). The second are taxable on an average of the three preceding years, whether the income has been or will be received in the United Kingdom or not, subject to deductions as before. The third are taxable only on the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, etc., on an average of three years.

To succeed on this appeal the respondent must establish that the securities, stocks, shares and property of which she is tenant for life are within Case V. (2.). But in the absence of particulars as to the nature of the "foreign Government securities, foreign stocks and shares and other foreign property," mentioned in para. 4 of the case, and of information upon which of them (*a*) the assessment has been made under Case IV. (1.) on the amount arising in the year of assessment, and (*b*) under Case V. (1.) on an average of the three preceding years, and (*c*) under Case V. (2.) no assessment at all because there has not been receipt in the United Kingdom, it is impossible to say whether the assessment is right or wrong. Your Lordships are not concerned with the figures. They are for the Special Commissioners. It is for them to make the assessment. But you are concerned with the principles

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upon which the Commissioners arrive at the figures, and without knowledge with respect to these it is not possible either to confirm or to disallow the assessment. The only information before the House is that upon an income of 12,000*l.* an assessment has been made of 2700*l.* This is simply 4*s.* 6*d.* in the £ upon 12,000*l.*, and must have been made upon the assumption that the income arises from securities within Case IV. (1.). The House has no means of saying whether this has been arrived at upon a right or a wrong principle.

The Master of the Rolls more than once in the course of his judgment says that the balance of the income is remitted to this country. That is not so. If the case were within Case V. (2.) (which he holds it to be) there would be nothing to assess, because the income is not remitted to the United Kingdom. And all the members of the Court of Appeal fell into error, I think, (1.) in failing to treat the construction of the will as matter of American law, and (2.) in deciding the case upon the footing that they were bound by a finding of fact in the case stated by the Commissioners that the income paid to the lady was not the actual income, but such balance sum as the trustees considered to be income after retaining such sums as they thought might be required to pay American income tax.

My Lords, in my judgment the appeal must be allowed and the matter referred back to the Commissioners to restate the case by stating :—

(*a*) The particulars of the "foreign Government securities, foreign stocks and shares, and other foreign property" sufficiently to show first, which of them are, in their opinion, "securities" within Case IV. (1.), and, secondly, which of them are, in their opinion, "stocks, shares or rents" under Case V. (1.), and thirdly, which are, in their opinion, "possessions out of the United Kingdom other than stocks, shares or rents" under Case V. (2.), and stating

(*b*) Which of these they have assessed on the income of the year of assessment and which on the average of the three preceding years, and

(c) Stating (as was admitted at the Bar) that the sums paid as stated in para. 4 of the case into the New York bank have not been in whole or in part remitted to the United Kingdom.

The order of Rowlatt J. must also, I think, be discharged and the case referred back to the Commissioners with a direction as above stated. Any costs paid under the orders below must be repaid. The appellant to have his costs here and below.

LORD CARSON (read by LORD BLANESBURGH). My Lords, I do not think it necessary, having regard to the full discussion which has taken place in the speeches which have been already made, to discuss the sections of the Income Tax Act or the Schedules which have been already referred to. The question which emerges from these is whether the money paid by the trustees of the will of Alfred Pell to the order of Lady Archer-Shee at Messrs. J. P. Morgan & Co.'s Bank in New York or any part of it, though not remitted to this country, was chargeable to income tax under the rules of Case IV. of Sch. D, in so far as it was interest arising from securities, and under the first rule of Case V., in so far as it arose from stocks or shares: the contention being on behalf of the respondent that under the circumstances of the case the sum so transferred constituted in the hands of the respondent's wife a foreign possession, and did not come within the rules mentioned as being either interest arising from securities or from stocks and shares.

It is, I think, essential in the first place to remember that the property which it is sought to tax in this case was in the hands of the trustees, to use the words of Sargant L.J., "a definite and specific trust fund," to the whole of the income and profits of which the respondent's wife was entitled under the will of her father Alfred Pell. Had the residue been still undetermined or had the share to which Lady Archer-Shee was entitled been a proportion only of the income or profits of the residue other questions would, no doubt, arise. The Commissioners in the case stated have found that the fund constituted under section 6 of the will

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(being the residue mentioned before) consisted of foreign Government securities, foreign stocks and shares and other foreign property, that the respondent's wife was entitled to have the whole of the income and profits from the said fund applied to her use, and that the Trust Company of New York (as trustee) had paid over such parts of the sum which they received from the said fund as they considered to be income as the same accrued to her order at a bank in New York whilst retaining in their possession such sums as they thought might be required to comply with the income tax or other provisions of American law. The Commissioners also held that the income receivable by the wife of the respondent from the Trust Company of New York arose from "the specific securities, stocks, shares, rents, or other property which constituted the trust fund." My Lords, under these circumstances I cannot myself draw any distinction between such a trust fund and one where specific securities, stocks and shares were vested in trustees to pay the rent and dividends to a cestui que trust for life. In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams* v. *Singer* (1), and in my opinion the Master of the Rolls correctly stated the law when he said (2) "that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees."

The Master of the Rolls, however, yielding to the argument so put forward by the respondent, held (3) that, having regard to the facts found, "what they remit is not what

(1) [1921] 1 A. C. 65. (2) [1927] 1 K. B. 123.
(3) [1927] 1 K. B. 120.

I will call the dividends in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. . . . . It has lost the shape of dividends, share warrants, or the like." In aid of this view he cites certain statements made by noble Lords in this House in the case of *Lord Sudeley* v. *Attorney-General* (1), and amongst others that of Lord Halsbury. "It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist." My Lords, with great respect to the Master of the Rolls, I do not think either his own reasoning or the quotations he relies upon have any application to a case such as the present when, as I have already pointed out, we are dealing with "a definite and specific trust fund." My Lords, I am unable to understand why or how the character of the sum paid to the respondent's wife ever became changed or, as the Master of the Rolls graphically says, "was no longer clothed in the form in which it was originally received, having no trace of its ancestry," simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid direct to the respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to law were discharged by the trustees or by the cestui que trust cannot, in my opinion, make any difference. I think the appeal should be allowed, but as it is evident that no distinction was made at the hearings before the Commissioners or Rowlatt J. between what amount of the sum in question consisted of securities or stocks and shares or other foreign property, and as different considerations apply under the income tax law to these different classes of property, I agree that the matter must be referred back

(1) [1897] A. C. 11, 15.

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to the Commissioners, and as a consequence that the order of Rowlatt J. must be modified or discharged.

LORD BLANESBURGH. My Lords, the ultimate question in this appeal turns upon the description which in income tax phraseology ought properly to be applied to the moneys paid during the two years in question by the Trust Company of New York to the order of Lady Archer-Shee, the respondent's wife, at Messrs. J. P. Morgan & Co.'s bank there. None of these moneys have been received in the United Kingdom. It is that fact which, if his contention as to their true description be correct, enables the respondent to say that he is not liable to pay income tax in respect of them, either in whole, in part, or at all.

Lady Archer-Shee's interests arise under the will of her father, an American citizen, domiciled in the State of New York at his death in or about the year 1904. The Trust Company of New York are the present trustees of his will. In them the residuary settled estate is vested. That estate, now ascertained as a corpus, consists, it is found by the case, of foreign Government securities, foreign stocks and shares, and other foreign property. The entire interest, dividends and profits of these are received by the trustees. Upon them the trustees are chargeable with American income tax, as, if they were English trustees, they would be chargeable with United Kingdom income tax. Being, however, resident Americans, they are no more chargeable with that income tax upon these "foreign" receipts than would any other resident American citizen receiving them on his own account. But is any one else so chargeable when these receipts as such have come to no other hand? That is the serious question involved in this appeal.

In the events which have happened the trustees hold the settled residue upon trust to apply its income and profits to the use of Lady Archer-Shee during her life. She has no interest in corpus. In default of issue surviving her the entire settled residue, subject to a payment thereout of $50,000 to a niece of the testator, is to be held on trust for

Columbia College, in the City of New York. It follows that Lady Archer-Shee is in no sense in control of the fund. The trustees are as much trustees for those entitled in remainder as for her.

It was in pursuance of the trust in her favour that the payments referred to were made. Their nature is stated by the Commissioners in their case. They were payments over by the trustees of "such part of the sums which they received from the said fund as they considered to be income as the same accrued . . . . while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law."

There can, I think, be no doubt as to the meaning of the Commissioners' statement. The payments made to Lady Archer-Shee were payments of all that remained of a fund of miscellaneous income receipts after there had been paid or retained thereout sums deemed by the trustees to be sufficient to discharge the trust and other outgoings that had first to be provided for. The payments represented, in other words, the actual net residuary income available for the tenant for life ascertained and only ascertained after payment or provision had been made of or for all prior claims against the gross residuary receipts. The income the lady received was the net income of a totality, not the income of particular items of property. Such seems to me to be the meaning of the statement.

Its implications, however, are no less clear. No suggestion of irregularity on the part of the trustees being made, the statement implies that Lady Archer-Shee had no right, during these two years over which the payments extended, to demand more than she received or to demand any of it at any earlier date than she received it. More important still, the statement, I think, implies, for the same reason, that until the moneys paid to her were actually paid over, she had neither property in them nor right to receive them. The proper result of any account taken would have shown—so much the statement implies—that the liability of the trustees to pay, and in the precise amounts, accrued only at the respective times at which the payments were actually

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made. Accordingly, if the statement in the case must be accepted by your Lordships, it is with reference and with reference only to a fund so circumstanced that the question of the liability of the respondent for income tax in respect of it must be determined by the House.

And, my Lords, although the statement with its implications appears, superficially, to be concerned as much with law as with fact, it is, in truth, a statement of fact only. As such, it is one by which your Lordships are, I think, indubitably bound. For the law which is referred to is, or should be, the appropriate American law by which the rights and duties of the trustees of this American testator's will are defined and the nature of the interest thereunder of Lady Archer-Shee determined. The true effect of American, as of any other foreign law, is in England a question not of law but of fact. As such therefore this statement must, I think, be regarded, and, if so, it must be accepted by your Lordships. This was, I conclude, the view of the Court of Appeal. If it was, I agree with it.

But, my Lords, I have the less hesitation in accepting without further inquiry the statement with all its implications as a correct finding of the American law ascertained by the Commissioners like any other fact, because I am myself satisfied that if this were the will either of a Scottish or of an English testator, the Commissioners' statement, in the sense I attribute to it, would be exactly paralleled. In other words, the case is not one in which the position is at all affected by any speciality of American law.

I take the case of a Scottish will first, because in relation to such a will your Lordships have the assistance of a decision of the First Division of the Court of Session in a case very close to the present. In *Murray* v. *Commissioners of Inland Revenue*, cited in argument and decided on June 18, 1926 (No. 245 Tax Cases), the facts were that the appellant's father by his will gave his residuary estate on trust for the appellant and her sister equally during their respective lives and directed the trustees to pay the expenses of management of the trust. The position in other words is indistinguishable

from the present. There the gross income of the estate after deducting an annuity of 70*l.* payable to the testator's widow under an ante-nuptial marriage contract, was 608*l.* 0*s.* 2*d.*, and the whole of it suffered income tax in the hands of the trustees. The appellant's only other income was 10*l.* War Loan interest, and for the purposes of a claim for repayment of income tax in respect of personal allowance, etc., she contended that her taxed income under her father's will was one half of the gross income of the estate, i.e., 304*l.* 0*s.* 1*d.*, without any deduction in respect of the expenses of the management of the trust. The First Division, at the instance, in that case, of the Crown—there is a certain piquancy in that fact—repelled the claim: "It is as plain as day," said Lord Clyde in delivering judgment, "that if a liferenter returns his or her income what he returns is precisely what he gets and nothing more nor less. It is as plain as day that the total revenue which arose from the residuary estate was not the income of any of the liferent beneficiaries in the residuary estate, but, on the contrary, was the income of the trustees who were administering the residuary estate. It was for them to pay the full income tax which the receipt by them of that income made incident upon them. It was for them to pay whatever may have been the expenses of administering it, and after meeting those expenses to divide the income of the residue among the liferent residuary beneficiaries. But there was no justification whatever either under the statute or, as far as I can see, in any view consistent with common sense for the course taken here."

Lord Sands is equally express, and refers to an aspect of the matter which is very relevant in the present case. The plaintiff's view, he says, was that one half of the 608*l.* 0*s.* 2*d.* belonged to her. And he continues: "That would be a sound view no doubt if any expenses that were incurred before any payment was made to her had been expenses incurred by somebody she had employed to collect the money, because then these expenses would have been her expenses if they had been incurred, as I say, by some one whom she was free to employ or not to employ. But that is not the situation.

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The expenses which were deducted before any payment was made to her were incurred not by any one she employed but expenses incurred by the trustees whom the truster had appointed to manage his estate and whom he had directed to pay all necessary charges of administration before any division took place." Lord Blackburn gives as an illustration that which is the present case. "The lady in this case is seeking to recover income tax upon an income taxed at source. If the position had been just the other way about, and if she was making a return of her income for the purpose of having the income tax assessed upon her income, I entertain no doubt whatever that she would have returned the sum which she actually received from the trustees as her income under the trust disposition and settlement of her father." "What the appellant was entitled to under the bequest," said Lord Ashmore, "was only one half of the full residue after deduction of the appropriate proportion of the expenses of the trust management."

I have cited these judgments at length because the report of them may not be readily accessible. The decision shows, I think, clearly that the statement made in the case here by the Commissioners would be an exact representation of Lady Archer-Shee's position if a Scottish Court were in relation to her father's will the forum of construction and administration.

And, my Lords, speaking for myself, I cannot doubt that the same would be true if this were an English will with its residuary funds vested in English trustees. In that case, Lady Archer-Shee's only specific interest in the income of the residuary estate would be an interest in that income cleared of all proper administrative or other payments thereout ranking in priority to any beneficial interest of her own.

The right of the trustees to retain moneys to answer these payments in praesenti or even, in a proper case, in futuro, is undoubted: see, e.g., *Stott* v. *Milne*. (1) Their duty, themselves to execute their trust, is equally undoubted. No receiver of the gross residuary income could be obtained

(1) (1884) 25 Ch. D. 710, 715.

against them except on proof of misconduct, actual or contemplated, and then only in a suit for the execution of the trusts of the will. In other words, in the eye of a Court of equity the interest of Lady Archer-Shee in the gross income of the estate is not that of a mortgagor in the property charged, but is exactly analogous to the interest of a residuary legatee of corpus before that residue has been actually ascertained. I agree with Sargant L.J. that to the case with which we are here concerned the reasoning of this House in *Lord Sudeley* v. *Attorney-General* (1) in relation to an unascertained capital residue is precisely applicable.

It is, of course, merely an accident that Lady Archer-Shee is sole lifetenant. During the life of the testator's widow each was entitled to a moiety of the residuary income. The position was in no way different then, and it would have been in no way different however numerous were the persons entitled to share the income between them. But it would be difficult to suggest, if the body of life beneficiaries were numerous, that there could be any normal right in any or all of them together other than a right to require the trustees to account for their receipts and payments in a due course of administration. Such, in my judgment, was Lady Archer-Shee's right and, in the absence of misconduct, no other.

My Lords, her position from an English point of view, could not, I think, be better put than it is by Rowlatt J. in his judgment. (2) "What this lady enjoys," he says, "is not the stocks, shares and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees, to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all. There is no doubt about the correctness of that proposition."

(1) [1897] A. C. 11. (2) [1927] 1 K. B. 116.

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I agree in that statement, and it is clear that, basing himself upon it, the learned judge, like the Court of Appeal, would have decided the case in favour of the present respondent had he not misapprehended the effect of *Williams* v. *Singer* (1), by failing to note, amongst other things, that the foreign dividends there in question had been in forma specifica actually received by the foreign beneficiary by the direction of the trustee—a statement which applies also to the case of *Pool* v. *Royal Exchange Assurance* (1) decided by this House at the same time.

Be that, however, as it may, it is now, I think, agreed on all hands that if the view of the will so expressed by the learned judge be correct, the respondent here must succeed. For, my Lords, what Lady Archer-Shee actually received at her bank in New York was, on that view, neither income from securities, stocks, shares or rents in any place out of the United Kingdom, but was, in the language of the Income Tax Act, "income arising from possessions out of the United Kingdom other than stocks, shares, or rents," income which while chargeable to income tax is only so chargeable to the extent to which it is received in the United Kingdom.

And such, as I hope I have shown, is also the position if the result be reached by reference to the statement in the case—the only proper foundation as I conceive for your Lordships' judgment—or by reference to the Scots law as expounded in the judgments I have cited.

My Lords, I confess to a sense of relief in being able to reach this conclusion. If the alternative view prevails and the respondent is charged with income tax according as the sums paid to his wife can, on dissection, be traced in their different parts to income received by the trustees from "foreign Government securities, foreign stocks and shares and other foreign property" respectively, a burden is placed upon him which, as it seems to me, he cannot discharge, and an inquiry is set on foot which may never be capable of answer. For, having regard to the statements in the case, it is, to my mind, more than doubtful whether the

(1) [1921] 1 A. C. 65.

trustees themselves could trace the payments to their sources. These American trustees of an American will are, of course, in no way concerned with any question of United Kingdom income tax not chargeable against themselves, and for the purposes of their own administration they have no intelligible object to serve by appropriating their retentions to any particular receipts, either rateably or in any other way, and I cannot suppose that they have ever done so. In any case, the respondent, who is not a beneficiary under the testator's will, could not require the trustees to do anything so entirely superfluous, and in the absence of any such declared appropriation he would himself be quite unable to furnish any of the statements X. or XI. (1.) of the Fifth Schedule to the Act which on this footing would be required of him. These practical difficulties confirm me in the view that this is not the kind of case to which either of these statements has any reference at all.

It has been suggested that the view which I have taken here may encourage evasion of a tax which ought to be paid. With reference to that, I would only observe that before 1914 no foreign income of any kind was taxed unless it was received in this country. In 1914, with what almost seems an arbitrary exception, such income arrived at as is prescribed in the statute of that year is now taxed whether received in this country or not. All that is involved in the view I have taken is that this particular interest of Lady Archer-Shee's is at present within that exception. It will rest with the Legislature to introduce the necessary amendment to the Act if, in its view, the time has come for limiting the exception by now excluding such a foreign possession as this of Lady Archer-Shee from its benefit.

My Lords, I do not doubt that the actual form of Rowlatt J.'s order was adopted in the circumstances stated by the noble and learned Viscount on the Woolsack. It was a form which effectively concealed the difficulties involved in the principle thereby adopted. But, like my noble and learned friend, I deprecate, in any event, any further inquiry in this case.

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I would rather than that allow the appeal simpliciter. With him, however, I am of opinion that it should be dismissed altogether.

Order of the Court of Appeal reversed. Judgment of Rowlatt J. discharged, and Cause remitted back to the Commissioners for the Special Purposes of the Income Tax Acts, with a direction to restate the Case by stating (a) *The particulars of the "foreign Government securities, foreign stocks and shares, and other foreign property" sufficiently to show, first, which of them are, in their opinion, "securities" within Case IV.* (1.), *and, secondly, which of them are, in their opinion, "stocks, shares or rents" under Case V.* (1.), *and, thirdly, which are, in their opinion, "possessions out of the United Kingdom other than stocks, shares or rents" under Case V.* (2.), *and stating* (b) *Which of these they have assessed on the income of the year of assessment and which on the average of the three preceding years, and stating* (c) *That the sums paid as stated in para. 4 of the Case into the New York bank have not been in whole or in part remitted to the United Kingdom. The respondent to repay to the appellant the costs paid by him in the King's Bench Division under the said order of Rowlatt J., and to pay the costs in the Court of Appeal, and also the costs in respect of the appeal to this House.*

Lords' Journals, July 26, 1927.

Solicitor for the appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Boulton, Sons & Sandeman.*

[PRIVY COUNCIL.]

SUNMONU . . . . . APPELLANT;

AND

DISU RAPHAEL (SINCE DECEASED) . . RESPONDENT.

J. C.*
1927
June 27.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Native Lands—Nature of Title—Rights of Family—Limitation.

Although it is possible by special conveyancing to confer a title to land in West Africa on an individual native, there is a strong presumption that the title of a native is a usufructuary right held on behalf of the community or family. Consequently, a native holding land in Lagos under a grant from the Crown is to be presumed to hold on behalf of his family, and so unable to acquire by exclusive possession an individual title against other members of the family.

Amodu Tijani v. *Secretary of Southern Nigeria* [1921] 2 A. C. 399 applied.

Judgment of the Supreme Court affirmed.

APPEAL (No. 30 of 1926) from a judgment of the Supreme Court of Nigeria (January 30, 1922) affirming a judgment of Pennington J.

The respondent, since deceased, brought an action in the Supreme Court of Nigeria against the appellant, claiming a declaration of title to a piece of land in Victoria Road, Lagos. The land had originally been the property of the plaintiff's father, Sule Raphael, deceased; the defendant was also a son of Sule Raphael and a half-brother of the plaintiff. The plaintiff sued on behalf of himself and the other children of Sule Raphael. The defendant had been in sole possession of the property since 1895. The main question in the appeal was whether the suit was barred by the Real Property Limitation Acts, 1833 and 1874, which were stated to apply in Nigeria.

The facts appear more fully from the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiff, and that decision was affirmed by the Full Court.

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

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The concluding paragraph of the judgment of Van der Meulen J. in delivering the judgment of the Full Court was as follows: "It has however been contended that the plaintiff cannot now maintain this action because for a considerable number of years he has stood by and has acquiesced in the defendant Sunmonu dealing with this property as his own. It must however be remembered that Sunmonu is himself a member of the family, and it is no unusual thing in Lagos for one member of a family to be in occupation and possession of family property without his either wishing or intending thereby to deprive the other members of the family of their rights and interest in it. Therefore I think it is impossible to regard the occupation of this property as constituting adverse possession, as might have been the case had Sunmonu been a stranger to the family. There is however evidence to show that the plaintiff did not acquiesce in the defendant's claim to an exclusive title, for he says that some eleven years ago, and again four years later, and also as recently as last year, he asked the defendant for the title deeds of the property and also offered to repay the 13*l.* which he had borrowed."

1927. June 24. *Bischoff* and *Irving* for the appellant referred to *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (1); *Amodu Tijani* v. *Secretary of Southern Nigeria* (2); *Lewis* v. *Bankole* (3); and *Akpan Awo* v. *Cookey Gam.* (4)

The respondents did not appear.

June 27. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The appeal before their Lordships comes from the Supreme Court of Nigeria, and that Court affirmed a judgment of Pennington J., sitting as judge of the Divisional Court. The appeal is that of the defendant, who appeals on the ground that he was entitled to enforce his right to the property in question. The original respondent is dead,

(1) [1915] A. C. 599, 608.
(2) [1921] 2 A. C. 399.
(3) (1909) 1 Nigeria L. R. 81.
(4) (1913) 2 Nigeria L. R. 97.

and he is represented by Awanotu, a daughter, but she has not appeared on this appeal, whether from want of money or otherwise is not important. Anyhow those were the parties.

The claim was to land in Victoria Road at Lagos, and the claim was that of the plaintiff, who is called Disu Raphael, now deceased. Disu Raphael said that this was property which belonged to the family, and he claimed a declaration that the property was the property of Sule Raphael, deceased, his father, and he claimed it for himself and for the rest of the family of Sule Raphael. The defendant, Sunmonu, was a half-brother of Disu Raphael. They were both sons of Sule Raphael, but by different mothers. It was claimed at one time that Sule Raphael had made a Christian marriage in Brazil with a Christian woman, and that consequently, according to the law of Nigeria, his property went according to English law, so that his eldest son, Disu Raphael, would have been exclusively entitled. This, however, was not urged at the Bar, and could not have been successfully urged, because both Courts concurred in finding that the Christian marriage was not established. There was, therefore, a native marriage, and, according to the native law, the property which descended, that is the estate, went for the benefit of the family.

It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important; because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani* v. *Secretary of Southern Nigeria* (1), a decision of this Board; in the judgment the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends prima facie to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer

(1) [1921] 2 A. C. 399, 404.

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title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. Prima facie the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification.

The matter is very well stated in the report made by Rayner C.J. on Land Tenure in West Africa. It is a report made in 1898, and the passage to which reference is made is adopted by the Privy Council in the case of *Amodu Tijani* v. *Secretary of Southern Nigeria* (1), which is called the "white cap" case. Rayner C.J. says: "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the chief or headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family." Their Lordships are aware that that was said of the title of the white cap chiefs. Their title was the question in that case, but the principle applies generally.

Sonmonu was sued in the way stated by Disu Raphael, and he pleaded possession, the Statute of Limitations, and also a purchase and the grant of the primary title to it. The history of the primary title is this: Before 1895, when Sule Raphael died, he had bought the land from Agebodeh, who had a Crown grant of it dated 1866, that is, he had a Crown certificate; he had no conveyance. It does not appear to have been usual in those days for the Crown to make grants; they granted a certificate of title. That was

(1) [1921] 2 A. C. 399, 404.

acquired by Sule Raphael from Agebodeh, and he took over the Crown document at the death of Sule Raphael Sunmonu and other members of the family were in possession. Shortly afterwards the others departed, leaving Sunmonu in sole possession. In 1905 Sunmonu went and got a fresh primary title for himself. He surrendered the old one and got a new document comprising the land in question and additional land.

Now various things were set up. Sunmonu said he had purchased from his mother, the widow of Sule Raphael; but the Courts below agreed in pointing out that the lady could have no right to sell, and that, more than that, the land officer of the Crown, the Commissioner, would have had no power to grant a new title which varied or superseded the old one, and the new grant must therefore be regarded as made to Sunmonu on behalf of the family, and they also said that there was no evidence of acquiescence in exclusive occupation by Sunmonu to the exclusion of the other members of the family. The usufruct remained right through, whether they exercised it or whether they did not, and it was quite usual for somebody to be in possession as trustee for his family, and, therefore, his occupation was in contemplation of their right.

The Courts agreed in finding the facts as stated, and what they say is well expressed in the concluding paragraph of the judgment of the Full Court delivered by Van der Meulen J. The result is that Sunmonu must be taken to have got in consistently with a native title and to have got in on behalf of his brother and sisters and the family generally.

In that state of things no statute of limitations could render any assistance to the appellant; there is no evidence about acquiescence, and the result is that their Lordships do not feel themselves able to disturb the judgments of the Court below, which are unanimous.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared there will be no order as to costs.

Solicitors for appellant: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1927 July 4.

LAFFER . . . . . APPELLANT;

AND

GILLEN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

South Australia—Crown Lands—Soldiers Settlement—Agreement for Sale—Forfeiture for Neglect to work Land—Absence of judicial Inquiry—Failure to pay Instalments—Invalidity of Notice—Registration of Forfeiture—Effect of Registration—Real Property Act, 1886 (*S. Aust. No.* 380), *s.* 94—*Discharged Soldiers Settlement Act*, 1917 (*S. Aust. No.* 1313).

The Minister of Repatriation of South Australia, acting under the Discharged Soldiers Settlement Acts, 1917–19, of that State, entered into an agreement for the sale to the respondent of certain Crown lands, payment to be by instalments. The agreement provided by clause 22 that if during the first ten years the vendor was satisfied on such evidence as he deemed sufficient that, among other things, the purchaser had neglected to work the land satisfactorily, he might determine the agreement by notice in writing. By clause 24 if there should be six months' default in payment of any instalment, and the vendor had given the purchaser a three months' notice demanding payment, the vendor by notice in the Government Gazette could declare the agreement determined.

By s. 94 of the Real Property Act, 1886: "The Registrar-General, upon receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the register of Crown lands, and such forfeiture or determination shall thereupon have effect."

Held: (1.) That the Commissioner, acting in good faith, had validly determined the agreement under clause 22, although he had held no judicial or quasi-judicial inquiry and the respondent had been given no opportunity of being heard.

(2.) That an entry made in the register under s. 94 of the Real Property Act, 1886, upon notice from the Commissioner that the agreement had been lawfully determined, operated under that section as a determination, although when the notice was given and the entry made the only purported determination was an unlawful one under clause 24.

Judgment of the High Court of Australia 37 C. L. R. 210 reversed.

APPEAL (No. 105 of 1926) by special leave from a judgment of the High Court of Australia (December 17, 1925) reversing a judgment of the Full Court of the Supreme Court of South Australia, and restoring the judgment at the trial.

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD SHAW, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

J. C. 1927 LAFFER v. GILLEN.

The respondent had been evicted by proceedings under s. 9 (xiii.) of the Crown Lands Act, 1915, of South Australia, from land of which he had possession under an agreement made with him under the Discharged Soldiers Settlement Act, 1917 to 1919, of that State. He brought the present action in the Supreme Court against the appellant, who was Commissioner of Crown Lands and Minister of Repatriation, claiming damages for trespass and wrongful eviction.

The facts are stated fully in the judgment of the Judicial Committee.

The trial judge (Poole J.) entered judgment for the plaintiff for damages to be assessed.

The judgment was reversed by the Full Court on the ground that there had been a valid determination of the agreement under clause 24.

An appeal to the High Court was allowed by a majority. The Court (Knox C.J. and Higgins, Rich and Starke JJ.) held unanimously that an entry in the register was effectual only if there had been a lawful determination, and that the determination under clause 24 was not lawful. The majority (Higgins J. dissenting) further held that the determination under clause 22 was invalid in the absence of a judicial or quasi-judicial inquiry at which the plaintiff had been heard.

1927. May 24, 26, 27. *Maugham K.C.* and *Villeneuve Smith K.C.* for the appellant.

Sir Herbert Cunliffe K.C. and *Andrewes Uttwatt* for the respondent.

As to the right to determine the agreement under clause 22 without an inquiry, at which the plaintiff was heard, reference was made to *Board of Education* v. *Rice* (1); *Local Government Board* v. *Arlidge* (2); and *De Verteuil* v. *Knaggs*. (3)

July 4. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. By the Crown Lands Act, 1915, of South Australia it was provided (s. 9 (xiii.),

(1) [1911] A. C. 179. (2) [1915] A. C. 120.
(3) [1918] A. C. 557.

J. C. 1927 LAFFER v. GILLEN.

that the Commissioner of Crown Lands might authorize any person to take possession of lands, messuages, or tenements belonging to the Crown whereon any person is in unauthorized possession or occupation and to forcibly eject every person therefrom. Early in May, 1923, the appellant, as Commissioner, purporting to act under the aforesaid statutory power, authorized certain constables to take possession of the lands now in question and to forcibly eject the respondent therefrom; they took possession of such lands accordingly and ejected the respondent therefrom.

Shortly afterwards the respondent, as plaintiff, instituted the present action against the appellant, as defendant, claiming damages for the entry and ejectment, alleging that it was wrongful.

The appellant pleaded the above mentioned statute, alleging that the respondent was in unlawful possession or occupation of the lands in question. The question, then, is whether the respondent at the time of his ejectment therefrom was in unlawful possession or occupation of the lands.

The action was tried on the question of liability only by Poole J., who by his judgment dated April 17, 1924, decided in favour of the respondent. On appeal to the Full Court that judgment was reversed by Murray C.J. and Angus Parsons and Napier JJ., who by their judgment dated August 12, 1924, allowed the appellant's appeal and ordered the respondent to pay the costs of the action. The respondent appealed to the High Court of Australia, who, on December 17, 1925, by a majority (Higgins J. dissenting), allowed the appeal with costs and restored the judgment of Poole J. The present appeal is brought by special leave of His Majesty in Council, the appellant undertaking to pay the respondent's costs of the appeal as between solicitor and client in any event.

There has thus been a very considerable difference of opinion in the Courts of the State and Commonwealth, and even those judges who came to a conclusion favourable to one side or the other were by no means unanimous in their reasons for their decisions.

At the conclusion of the war the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined, amongst other things, to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled, and for this purpose obtained the passing of the Discharged Soldiers Settlement Act, 1917, and subsequent amending Acts. The administration of these Acts was entrusted to the Minister of Repatriation, a corporation sole created by the Act of 1917.

The appellant at all material times held the two offices of Commissioner of Crown Lands and Minister of Repatriation.

It is obvious that for the success of such a scheme two main objects were in view—the proper cultivation and development of the land and the advantage of the men settled thereon. Superintendents and inspectors were appointed whose duty it was to inform themselves of the conduct and prospects of the settlers and to report thereon to the Minister.

The respondent, a discharged soldier, who had had some training on a Government training farm, by a letter dated February 9, 1918, applied for a grant of the lands in question, and on February 25, 1918, he was informed by letter of the Minister that his application was granted and of the conditions on which the land would be held. Except that the letter stated that for the first twelve months his occupancy of the land would be strictly probationary, it is unnecessary to set out its terms, inasmuch as they were embodied in the formal agreement to be presently mentioned.

The respondent appears to have been let into possession of the lands on March 1, 1918. On April 25, 1920, he made a formal application for the grant to him of an agreement over the land.

The agreement is dated March 1, 1919, the day on which the probationary period expired, but it was not actually sealed by the Minister or signed by the respondent until February 26, 1921. It was treated before this Board as common ground that for purposes of construction and effect the date of the agreement is March 1, 1919.

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The agreement purports to be made between the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of His Majesty the King (thereinafter called "the vendor") of the one part and the respondent (thereinafter with his executors, administrators and assigns called "the purchaser") of the other part. It may be observed in passing that it is clear from the contract that in every passage material to the case " the vendor " means the Minister and not His Majesty himself.

The agreement was to be for a term of sixty-five years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described for 2106*l.*, subject to a reservation of minerals.

It is desirable to set out the provisions for payment of purchase money and interest. They are as follows :—

" 3. The purchaser shall pay the said purchase money and interest thereon by instalments as follows :—

" (i.) No instalments shall be payable for the first year of the term of this agreement.

" (ii.) During the succeeding four years of the term of this agreement the purchaser shall pay interest on the said purchase money at the following rates : For the second year at the rate of 2*l.* 10*s.* per cent., for the third year at the rate of 3*l.* 10*s.* per cent., for the fourth and fifth years at the rate of 5*l.* per cent. per annum. Such interest shall be payable by equal half-yearly instalments of 26*l.* 6*s.* 6*d.* during the second year, of 36*l.* 17*s.* 1*d.* during the third year, and of 52*l.* 13*s.* during the fourth and fifth years of the said term, such instalments to be paid on August 31 and February 28 respectively in each year.

" (iii.) During the remainder of the term of this agreement the purchaser shall pay the said purchase money and interest on the balance thereof for the time being unpaid at the rate of 5*l.* per cent. per annum ; by half-yearly instalments of 55*l.* 10*s.* 11*d.*, such instalments to be paid on the days of the months lastly hereinbefore mentioned in each and every year until the whole of the said purchase money and interest shall have been paid."

Then follow certain conditions as to residence, the proper cultivation and improvement of the land, and other matters not material to be set forth in detail.

Clause 22 is as follows: "If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit and upon the expiration of three months from the giving of such notice, this agreement and the right of the purchaser to complete the purchase and to possession of the said land shall cease and determine and be void anything in this agreement to the contrary notwithstanding."

After a provision in clause 23 for return in the event of surrender or forfeiture of instalments of purchase money already paid and for certain allowances for improvements, clause 24, so far as it is material, is as follows: "And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor . . . . and the vendor may thereupon insert a notice in the Government Gazette declaring this agreement to be forfeited and such notice appearing in the Government Gazette shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited."

The respondent never paid any of the instalments of interest payable under clause 3 (ii.) of the agreement, and on December 21, 1921, there remained due the following—namely, The payment due on August 31, 1920, 26*l.* 6*s.* 6*d.*; that due on February 28, 1921, 26*l.* 6*s.* 6*d.*; and that due on

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August 31, 1921, 36*l.* 17*s.* 1*d.* It will be observed that of these payments the first two only were then six months in arrear.

On December 21, 1921, the Assistant Secretary for Lands wrote and sent to the respondent the following letter: "I am directed by the Hon. Commissioner for Crown Lands to advise you that it is intended to cancel soldiers' acquired agreement No. 30 and to re-offer the land unless all arrears are paid within two months from this date. In the event of forfeiture taking place as indicated, you will be liable for payment of amounts due up to the date of actual cancellation."

"Payment due	31/8/20 ..	26*l.* 6*s.* 6d.	and
,,	28/2/21 ..	26*l.* 6*s.* 6*d.*	interest
,,	31/8/21 ..	36*l.* 17*s.* 1*d.*	thereon."

Agreement No. 30 is the agreement in question.

After some correspondence the Secretary for Lands on November 15, 1922, wrote to the respondent a letter in which he informed him that the agreement had been cancelled and the land was then Crown land and would be dealt with at an early date.

In the Government Gazette of December 7, 1922, there was published the following notice dated December 6, 1922: "Notice is hereby given that the lease and agreements mentioned and described at the foot hereof have been cancelled by the Commissioner of Crown Lands in terms of section 63 of the Crown Lands Act of 1915 and are hereby declared forfeited.—(Signed) GEO. R. LAFFER, Commissioner of Crown Lands and Immigration." There then follows a reference to the agreement in question and the words "non-payment of arrears."

Finally, to complete this part of the story, on December 22, 1922, the appellant, as Commissioner of Crown Lands, signed a notice addressed to the Registrar-General and expressed to be given in pursuance of s. 94 of the Real Property Act, 1886, that the Crown lease therein mentioned, being the agreement in question, had been lawfully and wholly determined.

This notice was sent to the Registrar-General on January 9, 1923, and on January 17, 1923, a memorial thereof, as

provided by s. 94 above mentioned, was duly entered in the register of Crown Leases as provided by s. 94 above mentioned, by being indorsed on the copy of the agreement filed in such register as provided by s. 93 of the same statute.

Sect. 94 is in the following terms: "The Registrar-General on receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the register of Crown Leases, and such forfeiture or determination shall thereupon have effect."

On January 11, 1923, the appellant, having been informed by the respondent's solicitors that in their opinion the notice of cancellation was not in order, consulted the Crown solicitor, and was advised that it would be unsafe to rely on the document of December 21, 1921, either as a notice in writing demanding payment within clause 24 of the agreement or as a notice in writing within the meaning of clause 22. He thereupon sent the respondent the following notice: "The Minister of Repatriation of and for the State of South Australia for and on behalf of H.M. King George the Vth, hereby gives you notice that he is satisfied upon evidence which he deems sufficient that you have neglected to work satisfactorily the land which by agreement for sale and purchase, No. 30, Register Book, vol. 645, fo. 10, you have agreed to purchase, namely, block 372, in the hundred of Wongyarra, and block 340, in the hundred of Gregory, and the said Minister accordingly hereby determines the said agreement, and gives you notice that upon the expiration of three months from the giving of this notice, the said agreement and your right to complete the purchase and to possession of the said land will cease and determine and be void. Dated the 24th day of January, 1923.—(Signed) GEO. R. LAFFER, Minister of Repatriation."

This notice was duly posted, addressed in accordance with the provisions in that behalf of the agreement, and was registered at the post office. The respondent refused to take it in, and it was ultimately returned through the dead letter office.

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After the three months had expired the appellant, as already mentioned, caused possession to be taken of the land, and ejected the respondent therefrom.

On these facts the appellant makes the following submissions :—

1. That the letter of December 21, 1921, was a sufficient three months' previous notice in writing demanding payment of the arrears, and that as default was made in such payment he was, as vendor, justified in cancelling the agreement, which was accordingly lawfully forfeited or determined.

2. That whether it was so or not such forfeiture or determination had effect under s. 94 of the Act of 1886 upon the entry above mentioned being made in the Register of Crown Leases pursuant to the notice of December 22, 1922.

3. That whether the agreement had already determined or not it was so determined at the expiration of three months from the date of the notice of January 24, 1923.

4. That if he establishes any one of these submissions the respondent was on May 1, 1923, in unauthorized possession of the land in question and his ejectment therefrom was justified by s. 9 (xiii.) of the Crown Lands Act, 1915.

As the appellant's final proceedings were based upon the provisions of clause 22 of the agreement and the notice of January 24, 1923, their Lordships propose to deal with this point first.

The contention of the respondent on this point is that before deciding to terminate the agreement it was incumbent upon the appellant to institute some judicial or quasi-judicial inquiry, or at the least to communicate to the respondent the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto. The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed.

In the present case the transaction to which the agreement related was effected under the provisions of Acts of Parliament specially passed for the purpose of providing for discharged soldiers and in particular by settling them on unoccupied lands for the twofold purpose of developing such lands and at the same time affording to the soldier settlers the opportunity of making good in life. The administration of the Acts was entrusted to a special Minister called the Minister of Repatriation, who was, of course, responsible to Parliament for his conduct in the matter.

The clause in question was inserted in the agreement in pursuance of an imperative regulation made under the Acts in question and having the force of an Act of Parliament.

It is obvious that the authorities contemplated that amongst the more or less experimental cases there would be a certain number of failures, and it seems not unreasonable to conclude that they intended to put into the hands of the responsible minister means whereby such cases might be readily dealt with, and, if necessary, a fresh start made.

Turning to the words of the clause, it is provided that the power in question may be exercised by the vendor—namely, the minister acting on behalf of His Majesty the King. The only conditions are that it must be exercised within the first ten years, and that the vendor is satisfied on such evidence as he deems sufficient that one or the other of the specified grounds exists. There is nothing in the words used to suggest as essential to the satisfaction of the vendor any particular form of inquiry, judicial or otherwise. It may fairly be assumed that those who required the clause to be inserted in every agreement of the kind were well aware that the vendor would be assisted by officers whose duty it would be to ascertain and report to him the conduct and prospects of the soldier settler, and that he would thereby be furnished with evidence which he might well deem sufficient to enable him to form a judgment. Merely to inform the person affected of what was in contemplation would be useless unless he was also given some particulars of the information on which the vendor proposed to act and to give such

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information, if it consisted, as it probably would, of reports from the minister's officers, would render their position impossible, and the knowledge that such might be the result would tend to defeat the object with which they were appointed—namely, the obtaining of honest and true reports.

Their Lordships agree with Higgins J. in thinking " that nothing is further from the intendment of this clause than a judicial or quasi-judicial inquiry." They also agree with the following passage in his judgment : " The power is confined to the first ten years, as years of probation ; the contract is one in which the chief object of the vendor is to benefit the purchaser because the purchaser is a man who has served the country in the Great War ; the facts of which the minister is to be satisfied involve issues of such a character as might lead to endless debate ; and the minister as administrator is under a duty to other returned soldiers to see that the first holder is not blocking them without advantage to himself and under a duty to the State to see that its generosity is not wasted."

In their Lordships' opinion the cases referred to in argument have no bearing on the present case. The vendor is under this clause exercising a merely administrative function, and is entitled to form an opinion on such materials as he himself thinks sufficient.

There is no suggestion that the appellant in the present case acted otherwise than in absolute good faith.

There appears in the Record a passage of the appellant's evidence in which he gives a general description of the materials before him, and this shows that he acted with great care and deliberation.

On the whole matter, their Lordships are of opinion that on this point the appellant is entitled to succeed.

The Board having come to this conclusion, it may be said that a decision on the other points is unnecessary. But they have been argued and various opinions thereon have been expressed in the Courts below, and their Lordships therefore think it right to state their own views upon them.

On the first point their Lordships have no hesitation in saying that the letter of December 21, 1921, was not a sufficient demand in writing within clause 24 of the agreement. It was, moreover, open to other attacks: it only purported to give two months for payment instead of three, one of the three sums or default in payment of which cancellation was threatened was not six months in arrear, and no distinction was made between it and the other sums, so that if the letter was, in fact, a demand, it would require payment of a sum to which the clause did not apply at all. Counsel for the appellant hardly pressed his submission on this point.

As to the effect of s. 94, this is a more difficult question, but their Lordships are of opinion that the appellant's contention is correct. The registrar is directed to make the entry in the register by which effect is given to the forfeiture or determination on receipt of the notice from the Commissioner that the Crown lease in question has been lawfully forfeited. In this respect the Crown lease is placed in a different position from that occupied by an ordinary lease. In this case the lessor, seeking to have registered the fact of re-entry, has to prove the fact, and that it has taken place in manner prescribed by the lease to the satisfaction of the registrar. The registrar is then to make an entry in the register, and the estate of the lessee in the land is then to determine: see Real Property Act, 1886, s. 126.

If the view of the appellant is not correct, then the Crown is in a less favourable position than the ordinary person. In the latter case when once he has satisfied the registrar and the necessary entry has been made in the register, the validity of the re-entry cannot be questioned, for the statute provides that the estate of the lessee in the land shall thereupon determine, whereas in the case of a Crown lease, if the respondent is right, the validity or otherwise of the forfeiture or determination might remain an open question until it should be decided whether it was lawful or not. It is more reasonable to suppose that in this case the duty of deciding the point was cast upon the responsible minister whose view was to be taken as final so far as the register is concerned. The two

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cases would then be on the same footing, except only that in the one case the decision affecting the register would be that of the registrar in the other that of the Commissioner.

The judges in the Courts below who decided against the appellant on this point do so on the ground that the forfeiture or determination which is to have effect is a lawful forfeiture or determination. Their Lordships cannot agree with this view; the forfeiture or determination is that above referred to—namely, one which the Commissioner in his notice says has been lawfully effected. It may be worth noticing that this is apparently the view taken by the registrar, for in the indorsement on the agreement he says that it "has been lawfully determined as appears by the notice from the Commissioner."

It has been suggested by the appellant that any hardship to individuals deprived of land by erroneous entries on the register is met by the provision in the Act contained for compensation either by the person responsible for an erroneous entry (s. 203) or out of the assurance fund (s. 208). Beyond saying that there appears to be something in the suggestion, their Lordships express no opinion on the matter, as the point was not really before them.

In their Lordships' view, therefore, the appellant fails on his first point but succeeds on his second. As he also succeeds on the third point he establishes his case on the fourth.

Their Lordships are therefore of opinion that this appeal should be allowed and the order of the High Court of Australia discharged, the order of the Full Court of South Australia being thus restored. As to the costs of this appeal the appellant, pursuant to his undertaking, must pay the costs of the respondent as between solicitor and client. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Sutton, Ommaney & Oliver.*
Solicitors for respondent: *Syrett & Sons.*

[PRIVY COUNCIL.]

METROPOLITAN MEAT INDUSTRY BOARD . . . . . } APPELLANTS;

AND

SHEEDY AND OTHERS . . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Crown—Debt due to Crown—Public Board with Discretionary Powers—Meat Industry Act, 1915, *No.* 69 (*N. S. W.*).

The Meat Industry Act, 1915, provided for the maintenance and control of slaughter-houses, cattle sale yards, and meat markets in Sydney and the adjoining district, and established the appellant Board to administer the Act. The members of the Board were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers, which it exercised at its discretion; any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Money received by the Board was not paid into the general funds of the State, but to its own fund:—

Held, that a debt due to the Board was not a debt due to the Crown, and that a claim to priority in the liquidation of the debtor company consequently could not be supported.

Fox v. *Government of Newfoundland* [1898] A. C. 667 followed.

Judgment of the Supreme Court 26 S. R. (N. S. W.) 420 affirmed.

APPEAL (No. 20 of 1926) from part of an order of the Supreme Court of New South Wales, in equity, dated July 27, 1927.

The order in question was made upon a summons issued by the liquidator of J. Carpenter Hales & Co., Ld., for the determination of the following questions arising in the winding up of the company: (1.) Whether the amount of 1554*l.* 14*s.* 6*d.*, being the total amount due by the company to the appellant Board, constituted a debt due to the Crown, and, if so, whether the Crown was entitled to payment in priority to all other unsecured creditors of the company. (2.) Whether the Board as landlord was entitled in priority to other unsecured creditors of the company to any, and if so, what amount as rent.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD BLANESBURGH, and LORD DARLING.

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Long Innes J., who heard the summons, held on question (1.) that the debt was not one due to the Crown; he consequently found it unnecessary to determine whether it would have been entitled to priority had it been so. On question (2.), which related to only a small portion of the above sum, he held that the Board was entitled to priority. There was no appeal from that part of the order. The judgment is reported at 26 S. R. (N. S. W.) 420.

The duties and powers of the appellant Board under the Meat Industry Act, 1915, by which it was established, appear from the judgment of the Judicial Committee.

1927. June 16, 17. *W. A. Greene K.C.* and *Nesbitt* for the appellant Board. Having regard to the duties and position of the appellant Board under the Act of 1915, the Board is a Government Department of the State, and a servant of the Crown. [Reference was made to *Mersey Docks* v. *Cameron* (1); *Graham* v. *Public Works Commissioners* (2); *Roper* v. *Public Works Commissioners* (3); *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (4)] The decision of the Privy Council in *Fox* v. *Government of Newfoundland* (5) was erroneously regarded as applicable. The debt being a Crown debt was entitled to priority. The Companies Acts of New South Wales do not contain sections corresponding to ss. 168 and 209 of the (English) Companies (Consolidation) Act, 1908.

Stamp for the second respondents, who represented the unsecured creditors, was not called upon.

July 5. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The only question before their Lordships is whether a portion of a debt of 1554*l.* 14*s.* 6*d.*, due to the appellant Board from a company in liquidation named J. Carpenter Hales & Co., Ld., is a debt due to the Crown. If it is, the entire debt may have priority over the debts due to all other unsecured creditors of this company,

(1) (1864) 11 H. L. C. 443.
(2) [1901] 2 K. B. 781.
(3) [1915] 1 K. B. 45.
(4) [1920] 2 K. B. 233.
(5) [1898] A. C. 667.

but if it is not a debt due to the Crown no question of priority arises. There was another question as to whether the appellant Board as landlord is entitled in priority over other unsecured creditors to money due for rent, but this further question is not raised on this appeal. The first respondent is the liquidator of the company, and the other respondents have been appointed by order in the liquidation proceedings to represent all unsecured creditors of the company other than the appellant Board.

Their Lordships have arrived at the same conclusion as Long Innes J., from whose decision this appeal is brought, and who was the judge of the Supreme Court of New South Wales in its equitable jurisdiction. They think that the debt cannot be recognized as a debt due to the Crown.

The whole of the amount due represented money owing to the appellant Board for telephone services and for sanitary and inspection fees. The real question is whether this amount is owing to the Crown, for as to the debt itself there is no doubt as to its validity. The appellant Board contends that if the debt is due to the Crown it is entitled to priority under the law of New South Wales relating to companies in liquidation. As the learned judge who heard the case decided that the debt was not due to the Crown it was not necessary for him to go into this question, and he did not decide it.

The appellant Board was constituted under the Meat Industry Act of New South Wales, 1915. This Act provides for the maintenance and control of abattoirs and slaughter-houses, cattle sale yards, and meat markets in the county of Cumberland in which the City of Sydney is situated, and so extends to a part of the State around that city. The Act vests certain properties in the appellant Board, and provides for the regulation of the slaughter of cattle and for other ancillary purposes. Before 1915 the business of slaughtering animals for food in the State had been in the main carried on by private enterprise, subject to the control of a number of local authorities. The Act of 1915 altered, and in a large measure superseded, two statutes of 1902. One of them,

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No. 37, related to the area of the City of Sydney and three miles round it. The other, No. 36, related in the main to all parts of the State of New South Wales not being within the City of Sydney. Under these statutes the slaughtering of cattle, the supervision of abattoirs, the prevention of nuisances, and other cognate matters were provided for. The powers conferred by the two statutes were to be put into force in places outside Sydney by the Council of the municipality where there was a municipality, and by the senior police officer of the district in other places. The statute No. 36 provided by s. 4 that the Council of the City of Sydney might appoint inspectors of slaughter-houses and of cattle intended for slaughter. Elsewhere within the State such inspectors were to be appointed by the municipalities or by the Government, as the case might be. Under both the Act relating to Sydney and that relating to the rest of the State the existing Board of Health constituted by the Public Health Act, 1902, was to have a power of supervision and inspection, and was to make regulations and to appoint its own inspectors.

So far as the City of Sydney and the county of Cumberland were concerned, the Meat Industry Act, 1915, almost completely superseded this system. A new Board, called the Metropolitan Meat Industry Board, was established and incorporated. On its recommendation inspectors and other officers were to be appointed by the Governor of the State for the administration of the Act. This Board was to have power to hold and sell or purchase land and to adapt buildings and to manage and maintain abattoirs and sale yards, and to deal, by purchase or sale, in cattle or meat. It was to regulate the slaughter and sale of cattle. By-laws were to be made by it and penalties were imposed for their breach. Many of the powers of the Municipal Council of Sydney relating to these matters were transferred to this new Board. Its powers were more extensive than those formerly exercised by the Board of Health.

The question in the present case is whether the debt is one due to the Crown, so that it falls within the prerogative right

of the Crown to priority of payment as against the general creditors of the debtor. If it does so this can only be on the footing that the prerogative of the Sovereign extends to a body such as the appellant Board. It is thus necessary to consider somewhat closely the scope of the Act of 1915, for this Act keeps alive, by s. 4, the powers already vested in the Board of Health as at the date of the passing of the new Act, and also, instead of making expenses payable out of the money to be provided by the Legislature, directs the levy of tolls and fees, to be levied by the new Board, and their payment into a fund out of which the expenses of carrying this Act into effect are to be met. In dealing with the question of liability to statutory poor law rate, the House of Lords, in *Mersey Docks* v. *Cameron* (1), laid down the principle of exemption in virtue of the prerogative in words which are important in this case, because of the analogy they present to the principle involved here. Lord Cranworth (2) says that when the Crown is not named in a taxing statute imposing a rate it is not bound by it, and that it follows that lands or houses occupied by the Crown, or by servants of the Crown, for purposes of the Crown, are not liable to the rate. There has been confusion, he adds, between property occupied for public purposes and property occupied by servants of the Crown. This principle, he goes on, exempts from rates not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. And on the same ground police courts, county courts, and even county buildings occupied as lodgings (for the judges) have been held exempt. But these decisions have all gone on the ground that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some respects the shield of the Crown to what might more fully be described as the public government of the country. In *Coomber* v. *Berks Justices* (3) the House of Lords reaffirmed the principle where the justices of the county had, under statutory powers, erected assize

(1) 11 H. L. C. 443. (2) 11 H. L. C. 508.
(3) (1883) 9 App. Cas. 61.

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courts, with the usual rooms and offices, and a county police station, with the usual accommodation for constables living there and for prisoners, and the buildings formed one block and were used for the administration of justice and for police purposes, and also for holding county and committee meetings, and various other occasional purposes, from which, however, no rent or profit was derived, that no income tax was payable. The administration of justice, including police powers, was treated as belonging to the Crown. The language used by Lord Cairns as Lord Chancellor in moving the judgment of the House in the earlier case of *Greig* v. *Edinburgh University* (1) was cited with approval: "The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor."

In delivering his opinion in *Coomber* v. *Berks Justices* Lord Blackburn indicated that if the question had not been covered by authority, there would, in his view, have been considerable force in the argument that as the county might be occupying property in order to fulfil a duty to the Crown which the county was required to fulfil at its own expense, it was not occupying it for the Government or in its service. But he thought that this question was in such instances settled by a stream of authorities which should not be disturbed. It will be observed that the ground of the decision was simply the principle that if the Sovereign is not named in the statute it does not apply to the Crown or to the servants of the Crown acting in its service. The opinion of Lord Watson makes this clear.

But as the exemption was thus attributed to the quality of the prerogative, it is clear that each case had to be scrutinized in order to ascertain whether it really came within the scope of the principle so laid down. In *Fox* v. *Government of Newfoundland* (2) such a question was brought before the Judicial Committee. It was held that balances

(1) (1868) L. R. 1 H. L. Sc. 348, 350. (2) [1898] A. C. 667.

in the books of a bank to the credit of the various local boards administering education in the colony were not debts to which the priority applied that had been given to debts due to the Crown or the Government as revenues of the colony. The reason was that the various boards of education were not mere agents of the Government for the distribution of money entrusted to them, but were to have, within the limits of general educational purposes, uncontrolled discretionary power in expending it. The service, in other words, was not treated as being the service of the Sovereign exclusively within the meaning of the principle, but their own service. *Gilbert* v. *Trinity House* (1) further illustrates this aspect of the question.

In the statute before their Lordships they think it not immaterial to observe that under the previous legislation of 1902 the local authorities entrusted with the powers which the Act of 1915 readjusts were certainly not constituted servants of the Crown under the then existing Acts. Their Lordships agree with the view taken by the learned judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of

(1) (1886) 17 Q. B. D. 795.

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the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Light & Fulton.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

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THE YURI MARU.

THE WORON.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Canada—Shipping—Admiralty Jurisdiction—Action for Breach of Charter-party—Colonial Courts of Admiralty Act, 1890 (53 & 54 *Vict. c.* 27, *Imp.*), *s.* 2, *sub-s.* 2—*Admiralty Act* (*R. S. Can.*, 1906, *c.* 141), *ss.* 3, 4—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49 *Imp.*), *s.* 22, *sub-s.* 1 (*a*) (*xii.*).

The effect of s. 2, sub-s. 2, of the Colonial Courts of Admiralty Act, 1890 (Imp.), is to limit the jurisdiction of Colonial Courts of Admiralty established under the Act to the Admiralty jurisdiction of the High Court of England, as it existed at the passing of the Act; the extension of the Admiralty jurisdiction of the High Court by the Administration of Justice Act, 1920 (Imp.), s. 22, repealed and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925 (Imp.), s. 22, does not apply to Colonial Courts of Admiralty.

Consequently, the Exchequer Court of Canada, which was established by the Admiralty Act (R. S. Can., 1906, c. 141) as a Colonial Court of Admiralty, has not, under s. 22, sub-s. 1 (xii.), of the above Imperial Act of 1925, jurisdiction in rem to try an action for damages for breach of a charterparty.

Judgment of the Exchequer Court of Canada [1927] Ex. C. R. 1 affirmed.

APPEALS (Nos. 11 and 15 of 1927) from judgments of the Exchequer Court of Canada (in Admiralty) dated November 10, 1926, reversing judgments of Martin J., the local judge of the British Columbia Admiralty District.

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD SHAW, LORD MERRIVALE, and LORD WARRINGTON OF CLYFFE.

The appeals, which were heard together, each raised the question whether the Exchequer Court of Canada, established under the Colonial Courts of Admiralty Act, 1890, had Admiralty jurisdiction in a claim for damages for breach of charterparty, the defendants not being domiciled, and the cause of action not having arisen within the local limits of the jurisdiction of the Court, but the ship having been arrested within those limits.

The facts and the terms of the relevant statutory provisions appear from the judgment of the Judicial Committee.

The local judge of the British Columbia Admiralty District (Martin J.) held that the Admiralty Court had jurisdiction. On appeal to the Exchequer Court of Canada his decision was reversed in judgments delivered by Audette J. in identical terms in each case. The judgment in the case of the *Woron* is reported at [1927] Ex. C. R. 1.

1927. May 17, 19, 20. *Sir John Simon K.C., G. Langton K.C.* and *Barton* for the appellants in the *Yuri Maru* appeal.

Porter K.C. and *W. L. McNair* for that respondent ship.

W. M. Griffen for the appellants in the *Woron* appeal.

Sir Leslie Scott K.C. and *Sir Robert Aske* for that respondent ship.

July 5. The judgment of their Lordships was delivered by

LORD MERRIVALE. These appeals are brought against judgments of the Exchequer Court of Canada in Admiralty by plaintiffs who had sued out in the District Court of British Columbia writs in rem and warrants of arrest with a view to the trial at Victoria of claims for damages under charterparties made and alleged to have been broken outside the local area of jurisdiction by parties not resident within that area.

In the case of the steamship *Woron* the arrest was in respect of damages stated at about 18,000 dollars. The plaintiffs are a Canadian company. The owners of the ship appear to be a joint stock company registered in England. The

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Woron was said to have been chartered for a voyage from ports in British Columbia to Yokohama and it was alleged that her master had wrongfully deviated upon the agreed voyage and thereby caused loss to the plaintiffs.

In the case of the ship *Yuri Maru* the plaintiffs are an Italian corporation. The vessel is Japanese, registered at Kobe, the property of owners domiciled in Japan, who have alleged (inter alia) that they became owners since the accrual of the alleged cause of action of the plaintiffs and that judgment in respect thereof had already been recovered by the plaintiffs against their predecessors in title. The claim of the plaintiffs in respect of which the arrest was made was 290,000 dollars for damages for breaches of a charterparty for nine months made in December, 1919.

In each case the owners of the arrested ship moved to set aside the writ and warrant of arrest for want of jurisdiction. These motions respectively were dismissed by Martin J. in the District Court, but upon appeal were allowed in the Exchequer Court of Canada.

In view of the fact that the substantial question for argument was the same in each of the appeals, counsel for both appellants and both respondents were heard by their Lordships in the course of one hearing. The question which is immediately raised in both cases is whether, irrespective of residence of the defendant or place of origin of the alleged cause of action, a Court of Admiralty in the Dominion may by arrest of a vessel within its area be called upon to adjudicate upon all claims of plaintiffs suing under any charterparty made in respect of the vessel.

Incidentally, the further question arises whether, throughout the Empire, there is a like right of litigants in Courts of Admiralty jurisdiction of proceeding, by process in rem, in respect of like claims, under like circumstances of absence of local residence of parties impleaded and non-existence of any cause of suit arising within the local jurisdiction.

The claim of the appellants is that by virtue of the Colonial Courts of Admiralty Act, 1890, which provides for the

establishment in British possessions overseas of Courts of Admiralty jurisdiction in lieu of the Vice-Admiralty Courts theretofore existing; and the Canadian statutes which have brought that Act into operation in the Dominion and invested with Admiralty jurisdiction thereunder the Exchequer Court of Canada; whatever jurisdiction in Admiralty is from time to time exercisable in the High Court of Justice in England is exercisable in Canada in the Exchequer Court. The jurisdiction of the Exchequer Court of Canada in Admiralty is exercised in the maritime Provinces of Canada by district judges, of whom the judge sitting in British Columbia is one.

By the Act of 1890 every Court of law in a British possession which (*a*) is declared by the local legislature to be a Court of Admiralty or (*b*) has unlimited civil jurisdiction, is constituted a Court of Admiralty, with the jurisdiction defined in the Act in terms the meaning of which is now in question. The Act provides further (s. 17) for the abolition, on the "commencement" of the Act in any British possession, of every Vice-Admiralty Court in the possession which theretofore had exercised Admiralty jurisdiction.

The due investment of the Exchequer Court of Canada in Admiralty with the jurisdiction defined in the Act of 1890 and the competence of the District Judge in British Columbia to exercise that jurisdiction are not in dispute.

The jurisdiction in Admiralty of the High Court of Justice in England did not extend to claims upon charterparties at the time when the Colonial Courts of Admiralty Act, 1890, became law. Jurisdiction over such claims was given in the first instance by the Administration of Justice Act, 1920, s. 5, in terms which have no apparent reference to courts out of England, since a proviso in the section limits the costs of actions recoverable thereunder in certain events by the amount of the costs which "might have been recovered if the proceedings had been brought in a County Court." The Act of 1920 was among the numerous jurisdictional statutes extending in date from 1873 onward which are consolidated in the Judicature (Consolidation) Act, 1925.

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The jurisdiction so conferred on the High Court in England is that on which the appellants rely.

In the statutes of 1920 and 1925 there are no words indicative of any express intention on the part of the legislature of conferring any extended jurisdiction on Admiralty Courts overseas.

The words for construction in the Act of 1890 are these: "The jurisdiction of a Colonial Court of Admiralty shall . . . . be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court of England whether existing by virtue of any statute or otherwise." The appellants claim that these words can only be understood as applying to conditions which are to come into being upon and after the passing of the Act. They offer, in effect, to make the meaning clear by reading into the sentence before the word "existing" the words "from time to time." The respondents on the other hand contend that the jurisdiction defined by the section is sufficiently and indeed unmistakably described as the jurisdiction of the High Court in Admiralty "existing" at the point of time when the Colonial Courts of Admiralty Act, 1890, became law.

Inasmuch as the use of words in the English tongue is not so rigidly governed by rule as to render impossible either of the alternative constructions of the parties, counsel on both sides properly discussed the subject-matter, origin and scope and apparent policy of the Act of 1890, with a view to demonstrate the true intent of the language used.

The establishment, in the overseas dominions of the Crown, of Courts of Admiralty jurisdiction under one common system, in place of the pre-existent Vice-Admiralty Courts called into being as occasion dictated in course of two or three centuries at the discretion of the Home authorities, is the most prominent of the facts in question. In a material passage in the judgment of Martin J. in favour of the appellants, the view taken by the learned judge as to the nature and scope and apparent intention of this transaction is thus stated (1): "The Vice-Admiralty Courts in Canada were abolished upon the coming into force

(1) [1927] Ex. C. R. 15.

of this court as established under the Canadian Act of 1891, but if those former courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of the said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case, it follows, to my mind, that the present Admiralty Court of Canada . . . . likewise marches in the same jurisdiction and it would require clear language to the contrary to deprive it of the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more."

To appreciate the extent to which the jurisdiction of the old Vice-Admiralty Courts was subject to automatic enlargement in harmony with an expanding jurisdiction in the High Court of Admiralty in England it is necessary to bear in mind the relation of the Vice-Admiralty Courts to the High Court during their period of development, the circumstances under which the ambit of the authority of the High Court and of the overseas Courts has been enlarged, and the mode in which as to each the process of expansion has gone on.

The extension of the powers of the High Admiral and his lieutenants or deputies in order to meet the needs which resulted from the growth of the Empire does not need to be described with particularity: see Marsden, Law and Custom of the Sea, vol. i., p. xiii. Selden gives the early form of the commission of the High Admiral, when the jurisdiction had been centred in one officer of State under that title: Mare Clausum, p. 196. Marsden sets out the first commission which—in 1643—extended beyond "England, Ireland and Wales and the Dominions and Isles of the same." It included "all the islands and English plantations within the bounds and upon the coasts of America": Marsden, p. 531.

The creation of Vice-Admiralty Courts overseas is also dealt with by Marsden (Marsden, Law and Custom of the Sea, vol. ii., pp. xiv., xv.); and Brown's Civil Law and

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Admiralty, published in 1802, presents from the standpoint of a learned civilian a broad view of the then existing system of Vice-Admiralty Courts constituted under commission of the High Admiral or the Lords Commissioners of the Admiralty. The substance of the matter as things stood before 1890 is concisely presented by an experienced public servant, Sir Henry Jenkyns, in these terms (Jenkyns, British Rule and Jurisdiction Beyond the Seas, p. 33): "In civil matters, the most important branch of extra-territorial jurisdiction, that of the Admiralty Court, was, until 1890, mainly exercised by Vice-Admiralty Courts established by an instrument under the seal of the office of Admiralty, issued in pursuance of authority given to the Commissioners of the Admiralty in England by a commission under the Great Seal of the United Kingdom. In practice, a judge of the Superior Court of the possession was always made judge of the Vice-Admiralty Court, but he held that office by virtue of an appointment from the British Admiralty, and not by virtue of his position as judge of the possession. His jurisdiction was vested in him personally, and not in the colonial court."

The jurisdiction exercised by the Vice-Admiralty Courts was commonly that of the High Court of Admiralty. The area of the exercise of the jurisdiction was enlarged as the Empire grew. Its juristic extent was not. For centuries that had been stabilized and strictly limited so far as the High Court of Admiralty was concerned by the vigilant supervision of the Court of King's Bench. The High Court of Admiralty never shared the inherent capacity for development which marked the English Courts of law and equity.

Great extensions of the Admiralty jurisdiction in England were made during the nineteenth century, before the passing of the Colonial Courts of Admiralty Act, 1890. Notable extensions had also been made during the same period by Acts of the Imperial Parliament in the jurisdiction of the Vice-Admiralty Courts. It would be wholly incorrect, however, to suppose that these were extensions of jurisdiction granted to the High Court of Admiralty here and thereupon

automatically operative in the Courts overseas. Parliament made its separate grants to the High Court of Admiralty as an English Court. Dr. Lushington, as judge of the Court, pointed out as early as 1859 that the extensions so made had no effect in the Vice-Admiralty Courts: see *Rajah of Cochin*. (1) At this Board in the same year the same conclusion was stated: *The Australia*. (2) Parliament in fact legislated for the High Court and the overseas Courts by numerous unconnected statutes.

The Admiralty Court Acts of 1840 and 1861 conferred specific powers, carefully identified and limited, upon the High Court in England. The Vice-Admiralty Courts Acts of 1863 and 1867 (26 Vict. c. 24; 30 & 31 Vict. c. 45) extended the powers of the Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments.

So far as the appellants' case rests upon a theory that without statutory action there was before 1890 a historic and progressive growth of Admiralty jurisdiction which was common to the High Court and the Vice-Admiralty Courts, or upon a supposition that any statutory enlargement of the jurisdiction of the High Court in England operated automatically to enlarge the jurisdiction of the Vice-Admiralty Courts, it cannot be sustained.

How then did Parliament, by the Colonial Courts of Admiralty Act, 1890, deal with the condition of affairs which had grown up under the old law?

The Act has three outstanding characteristics. So far as the "instance" jurisdiction is concerned, its plain intent is the establishment as part of the machinery of self-government within each autonomous area of courts locally constituted, wherein judges locally nominated should exercise such a measure of jurisdiction in Admiralty within prescribed limits as the government on the spot might think convenient. Subject to specific reservations the statute applied to the

(1) (1859) Swa. Adm. 473. (2) (1859) 13 Moo. P. C. 132, 160.

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Empire, and it provided that on the commencement of the Act in any British possession, and subject to its provisions, every Vice-Admiralty Court in the possession should be abolished.

By s. 2, sub-s. 1, and s. 3, the legislature of an overseas possession is enabled, at its will, to declare a court of unlimited civil jurisdiction within its area to be a Court of Admiralty; to limit territorially or otherwise the extent of the jurisdiction in Admiralty to be exercised in such Courts; and to confer partial or limited jurisdiction in Admiralty upon subordinate or inferior courts. In the absence of local legislative action, a court of "original unlimited civil jurisdiction" in any possession is constituted a Court of Admiralty. And by s. 2, sub-s. 1: "where in a British possession the governor is the sole judicial authority, the expression 'Court of law' includes such Governor."

Incidentally to the fact that the Act of 1890 empowers self-governing communities to decide for themselves within defined limits what shall be the ambit of the jurisdiction to be exercised by their courts by means of process in rem, it is necessary to bear in mind that, even in England, conflict of opinion long existed as to the advantage of extending the availability of this process, and that the right of trial within a local jurisdiction of actions arising elsewhere is not always an unmixed benefit. Opinion may well differ between state and state as to whether, e.g., a port which is chiefly a port of call will be benefited by the existence of a power in all and sundry to arrest vessels found within its limits in order that strangers may litigate in the local court questions which have arisen elsewhere.

The Act of 1890 empowers the legislature in any of the dominions to determine by its own statute, subject to the Royal Assent on the prescribed special reservation, what shall be the extent of the Admiralty jurisdiction of the Courts for which the local legislation provides. Yet, if the contention of the appellants in this case is sound, an Act of the Imperial Parliament, purporting on the face of it to apply to England and the High Court in London, has without any choice of the

self-governing states in the Empire peremptorily enlarged the jurisdiction of their Courts in Admiralty, subject only to a power in them under s. 3 of the Act of 1890 to limit such jurisdiction anew by a new local law, after compliance with the conditions of s. 4 whereby such a law, unless previously approved by a Secretary of State, must be "reserved for the signification of His Majesty's pleasure therein or contain a suspending clause."

The present case arises upon an enlargement by the Imperial Parliament of the Admiralty jurisdiction of the High Court in England. But the fact cannot be overlooked that during the last half-century the distribution of business in the High Court in England has been the subject of very numerous enactments, and there is involved in the question now presented for determination the further question whether the withdrawal of any cause of action from Admiralty process in England would ipso facto operate a corresponding diminution in Admiralty jurisdiction in the Courts overseas. A construction of the statute of 1890, which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self-governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction in rem, but no power to undo an unwelcome abatement, manifestly could not be adopted unless the words of the statute should be found to leave no alternative.

Neither the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England.

On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time

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be added or excluded is left for independent legislative determination.

Their Lordships will humbly advise His Majesty that in their opinion these appeals fail. The costs of the respondents must be paid by the appellants.

Solicitors for appellants: *Stephenson, Harwood & Tatham; W. & W. Stocken.*

Solicitors for respondents: *William A. Crump & Son; Botterell & Roche.*

[PRIVY COUNCIL.]

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ONTARIO JOCKEY CLUB, LIMITED . . APPELLANTS;

AND

McBRIDE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Company—Transfer of Shares—Restriction of Right to transfer—Agreement by Shareholder giving Company a right of Pre-emption — Validity of Agreement.

On an allotment of fully paid shares in an Ontario company the allottee, in common with all other allottees, signed an agreement with the company that he would not transfer the shares to any person not already a shareholder without first giving the company an opportunity to purchase. That agreement was in the terms of a then valid by-law of the company, the effect of which appeared in the share certificate. Later, by virtue of his holding, the shareholder was allotted further fully paid shares. On that allotment he did not sign an agreement, but he accepted a new certificate for the old and new shares, which were not identified by numbers, stating the restriction. Previously to the further allotment the legislature of Ontario had enacted subject to an immaterial exception that no company by-law should be passed which in any way restricted the right of the holder of a fully paid share to transfer it. The holder having sold one share without giving the company an opportunity to purchase it, the directors refused to register the transfer:—

Held, that the agreement was binding upon the shareholder as to all the shares he held, and that the directors were entitled to refuse to register the transfer; it was not necessary to consider whether the legislative provision was retrospective, nor other questions which would have arisen in the absence of the binding agreement.

Judgment of the Supreme Court [1927] S. C. R. 84 reversed.

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

APPEAL (No. 55 of 1927) by special leave from a judgment of the Supreme Court of Canada (December 15, 1926) affirming a judgment of the Appellate Division of the Supreme Court of Ontario (November 20, 1925), which reversed the judgment at the trial.

The action was brought in the Supreme Court of Ontario by the respondent against the appellant company, claiming a declaration that he was a shareholder in that company, and a mandatory order to enter his name upon the share register, upon presentation of a share certificate and duly executed transfer, as holder of one share. He also claimed damages.

The facts appear from the judgment of the Judicial Committee.

The trial judge, Lennox J., dismissed the action. The Second Appellate Division reversed the decision and ordered that the plaintiff's name be entered in the register. That decision was affirmed by the Supreme Court of Canada (Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting). The appeal to the Supreme Court is reported in [1927] S. C. R. 84.

1927. July 5, 7. *Tilley K.C.* and *Pritt K.C.* for the appellants.

H. J. Scott K.C. and *T. Mathew* for the respondent.

July 25. The judgment of their Lordships was delivered by

LORD WRENBURY. On June 23, 1922, one Chas. Millar executed in favour of the respondent, McBride, a transfer of one share in the appellant company, the Ontario Jockey Club, Ld. The transfer was presented to the company for registration, but registration was refused on the ground that the provisions of the agreement and by-law presently mentioned had not been observed. Thereupon the respondent, on November 24, 1923, brought this action to enforce registration. The litigation ran its course, and resulted in an order dated November 20, 1925, and affirmed by the Supreme Court of Canada on December 15, 1926, by which the company

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was ordered to enter the name of McBride on the register. This is an appeal by special leave from the judgment of the Supreme Court.

The transferor Millar is not a party to the action. The order under appeal to put McBride's name on the register is necessarily an order to take Millar's name off. Apart from the merits of the case their Lordships had they been in favour of the respondent on this appeal would have found difficulty in affirming an order for rectification made in an action to which the transferor was not a party. But inasmuch as upon the merits they think that the order cannot be sustained, they have no difficulty in dealing with the case in the absence of the transferor. They therefore proceed to deal with the case upon the merits.

The appellant company was incorporated on April 29, 1881, by letters patent issued under the then existing Ontario Company's Act, R. S. Ont., 1877, ch. 150, with a capital of $20,000, divided into 200 shares of $100 each. On June 28, 1909, Charles Millar was the registered holder of one share.

In 1910, before the increase of the shares from $100 each to $1000 each and before the issue of the new shares presently mentioned, he obtained a second share. On November 10, 1910, the committee of the company passed and on November 30, 1910, the company ratified a by-law in the following terms :—

By-law No. 37 : 1. Save as hereinafter provided, no shares or interest in the club shall at any time be transferred to any person not already a shareholder, until the club has had an opportunity to find a purchaser for such share or interest as hereinafter provided.

2. Any shareholder desiring to sell his share or shares, or any portion thereof, shall give notice in writing to the club that he desires to sell and transfer the same, and such notice shall constitute the club such shareholder's agent for the sale of such share or shares to any purchaser at a price to be ascertained as hereinafter provided or at any lower price that may be fixed by the shareholder desiring to sell.

3. That if the club shall within the space of thirty days after such notice find a purchaser desiring to purchase such share or shares and shall give notice thereof to the person desiring to sell, he shall be bound at such time within ten days thereafter as the club shall appoint upon payment of the price named or to be ascertained as hereinafter provided to transfer such share or shares to such purchaser.

4. That if in any case the selling shareholder after becoming bound as aforesaid makes default in transferring such share or shares, the club may receive the purchase money and shall thereupon cause the name of the purchaser to be entered upon the register as the holder of such share or shares, and shall hold the purchase money in trust for the selling shareholder, his executors, administrators or assignees and the receipt of the club for the purchase money shall be a good discharge to the purchaser, and he shall not be bound to see to the application thereof and after the name of the purchaser shall have been entered in the register in purported exercise of the aforesaid power the validity of the transfer entry or the proceedings shall not be questioned by any person and the purchaser shall be deemed and taken to be the owner of the said share or shares.

5. That subject to the next succeeding paragraph the price to be paid by the purchaser, if no less price is fixed by the seller, shall be the par value of such share or shares plus the proportionate part of undivided profits, shown by the annual balance sheet of the club next prior to the giving of such notice,—Provided that if instead of there being undivided profits such balance sheet shows an impairment of capital of the said club then the proportionate part of such impairment shall be deducted from the par value of such share or shares in ascertaining the said price.

6. Notwithstanding anything contained in the foregoing provisions no shareholder shall sell and transfer any share or shares to any person not a shareholder for a price less than the amount to be ascertained as above until the club shall first have been given an opportunity for five days to find a purchaser for such share or shares at such lower price.

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At that date (November 10, 1910) the Ontario Act of April 20, 1907, was in force. Sect. 48 of that Act is in the following terms: "48. The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the Special Act, the letters patent or by-laws of the company may be prescribed." Sect. 87 (*a*) is in the following terms: "87. The directors may, from time to time, make by-laws not contrary to law, or to the letters patent of the company, or to this Act, to regulate: (*a*) The allotment of shares; the making of calls thereon; the payment thereof; the issue and registration of certificates of shares; the forfeiture of shares for non-payment; the disposal of forfeited stock and of the proceeds thereof; the transfer of shares; . . . ." By-law 37 was made when these statutory provisions were in force.

On November 14, 1910, supplementary letters patent were issued increasing the company's capital to $200,000 in 200 shares of $1000 each, and the supplementary letters patent provided that the new stock should be issued to the existing shareholders share for share, "and the amount paid by each shareholder on his present shares shall be applied on account of the new shares of such increased amount."

When these supplementary letters patent were issued, Chas. Millar received a certificate for two shares, each of $1000, in place of his original two shares of $100 each, and without making any further payment upon them. The only payment he had made was $30 on each of the two original shares of $100. The balance of $70 was paid up as a "stock dividend" on each of the two shares.

On December 18, 1910, after the issue of these supplementary letters patent, Chas. Millar, upon signing the agreement next set forth received a certificate, No. 37, for two shares of $1000 each in place of his two shares of $100 each.

The agreement was in the following terms: "I hereby acknowledge the receipt of certificate number 37 for two shares of the capital stock of the Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the

conditions contained in by-law number 37 of the club, passed on November 24, 1910; which require that before any shareholder can transfer a share to any person not already a shareholder of the club, notice shall first be given to the club of the desire of such shareholder to sell his share or shares and the club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said by-law, or at any less price that may be fixed by the seller. (Signed) CHAS. MILLAR."

There is no dispute that the by-law here stated to have been passed on November 24, 1910, is the above by-law passed on November 10, 1910, and ratified on November 30, 1910.

Upon the certificate which Millar received was printed a copy of this agreement and also a footnote (hereinafter called for convenience the restrictive footnote) in the following terms: "The shares of the capital stock of the Ontario Jockey Club represented by this certificate are subject to the provisions of by-law number 37, of the Ontario Jockey Club, passed on November 24, 1910; which require that before any shareholder can transfer a share to any person not already a shareholder of the club, notice shall first be given to the club of the desire of such shareholder to sell his share or shares, and the club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said by-law, or at any less price that may be fixed by the seller." Similar agreements were signed and similar certificates issued to every holder of shares in the company.

By the Ontario Companies Act, 1912, the above section of the Act of 1907 was replaced by a section as follows: "54.—(1.) The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the Special Act, the Letters Patent, Supplementary Letters Patent or by-laws of the company may be prescribed. (2.) Subject to s. 56, no by-law shall be passed which in any way restricts the right of a holder of paid up

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shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof. *New.*" Sect. 56 is a section dealing with the case of a shareholder who is indebted to the company. It is for the present purpose not material.

By further supplementary letters patent dated November 14, 1916, the capital of the company was increased to $600,000 by the creation of 400 new shares of $1000 each, and under these letters patent two of these new shares were issued to every shareholder for every share then held. Chas. Millar consequently became the holder of two shares with the addition of four shares, making six shares in all. The shares in the company were never identified by number or otherwise.

All the shareholders on the register at the date of the first supplementary letters patent signed an agreement in the terms above set forth, and received certificates with the restrictive footnote printed upon them. They were not required to sign again when they acquired the additional shares under the second supplementary letters patent. Every certificate, however, for shares in the company which is in issue has printed upon it the footnote above set out and called the restrictive footnote.

It was in this state of facts that the transfer of June 23, 1922, was made by Chas. Millar to the respondent McBride.

Upon these facts the first question which presents itself is this : On June 23, 1922, could Chas. Millar execute in favour of McBride, who was not already a shareholder, the transfer of a share, tender in support of the transfer the certificate which he held for six shares bearing upon its face the restrictive footnote, and call upon the company to register the transfer, notwithstanding the agreement which he had signed on December 18, 1910 ? An argument has been advanced that there was no consideration for that agreement. Their Lordships do not agree. It was a term of the arrangement under which the shares were issued under the supplementary letters patent of 1910 that the receipt and agreement which Millar signed on December 18, 1910, should be signed by Millar and by all other shareholders, and it was so signed. The

issue of those shares was valuable consideration passing to the allottees, in exchange for which they gave their signatures. Whether by-law No. 37 was or was not binding as a by-law, it was competent to the shareholder to bind himself to the restriction expressed in it, and by signing the agreement he became, and by virtue of their signatures given on receiving the additional shares every shareholder became, bound by that restriction. It was urged, however, that even if this is so as regards the two shares, the same proposition is not true of the other four shares afterwards issued to Millar. It is true that the agreement was not signed again on the issue of the four shares, but the restrictive footnote was printed on the certificate for the six shares which was substituted for the certificate for the four shares, and the allottee received the certificate for the six shares as being a certificate of a body of six shares all of which were alike issued and accepted upon the terms on which the two shares were originally issued.

That restrictions may be placed upon a shareholder's right of transfer of his shares cannot be questioned. The cases are numerous in which such restrictions have been upheld. Shares are prima facie transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. The restriction in the present case is of that kind. For these reasons their Lordships are of opinion that when the transfer, accompanied by the certificate bearing the restrictive footnote, was tendered for registration the company was entitled to refuse to register.

Under these circumstances it is unnecessary to express any opinion upon some interesting points of law which in the absence of this agreement it would have been necessary to decide. It is unnecessary to determine whether the

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Ontario statute of 1912 is retrospective so as to invalidate a by-law valid under the statute of 1907. It is unnecessary to determine whether the affirmative and operative word "restrictions" in both the Act of 1907 and that of 1912 is curtailed by the administrative word "regulate" in each of those Acts. It is unnecessary to decide whether if there had been no agreement the by-law as a by-law would have been binding. It is unnecessary to consider whether the decision of this Board in *Canada National Fire Insurance Co.* v. *Hutchings* (1), extends beyond the case of an unrestricted power to disapprove transfers. It is unnecessary to call in aid the decision in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (2), upon which Idington J. relied as being in his opinion conclusive against the transferee. That case has, in fact, in their Lordships' judgment, little, if any, bearing upon this case. The question there was whether the purchaser who had got the ship was bound by the restriction as one attaching to the ship. The question here is whether the transferee who has not got the share, is by the restriction prevented from getting it. The present case falls to be decided on the ground that by the agreement of the transferor and of every other shareholder in this company, the shares in this company are transferable only subject to the right of pre-emption expressed in the language found in by-law No. 37.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the action dismissed with costs before this Board and below.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

(1) [1918] A. C. 451. (2) [1926] A. C. 108.

[PRIVY COUNCIL.]

LUSCAR COLLIERIES, LIMITED . . APPELLANTS; J. C.* 1927

AND

McDONALD AND OTHERS . . . . . RESPONDENTS. *July* 28.

ATTORNEYS-GENERAL FOR CANADA AND FOR ALBERTA . . . . . } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railways—Jurisdiction of Railway Board—Branch Line in Province—Railway connecting Provinces—Through Operation of System—Railway Act, 1919 (9 & 10 *Geo.* 5, *c.* 68, *Dom.*), *ss.* 5, 6—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *head* 10 (*a*).

The appellant company owned a short railway line in the Province of Alberta branching from a line which branched from the Canadian Northern Railway at a point within the Province. Both branches were operated by the Canadian Northern Railway Company under agreements, and traffic could pass from the appellants' line without interruption into such other Provinces as were served by that company's railway. The Railway Board made an order declaring its power to grant an application by the first respondent for running rights over the appellants' line, with permission to construct a short track joining it:—

Held, that the Railway Board had power to grant the application, since the appellants' line was part of a system of railways operated together, and connecting one Province with another; it was therefore within the legislative authority of the Dominion under s. 92, head 10 (*a*), of the British North America Act, 1867, and consequently a railway to which by s. 5 of the Railway Act, 1919, that Act applied. It was unnecessary to determine whether the declaration, as to the general advantage of Canada, in s. 6 (*c*) of the Railway Act, 1919, was a valid declaration under s. 92, head 10 (*c*), of the British North America Act, 1867.

Judgment of the Supreme Court [1925] S. C. R. 460 affirmed.

APPEAL (No. 47 of 1926) by special leave from a judgment of the Supreme Court of Canada (May 18, 1925) affirming a declaratory order of the Board of Railway Commissioners for Canada.

The respondent McDonald, who held a coal lease of property in the vicinity of the appellants' railway line in the Province of Alberta, applied to the Board of Railway Commissioners

* *Present:* VISCOUNT HALDANE, VISCOUNT SUMNER, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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(hereinafter referred to as "the Railway Board") for an order granting him running powers over the appellants' line, and requiring the Canadian Northern Railway Company (by which the appellants' line was operated) to grant him permission to construct a spur track serving the coal property of which he was lessee.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

On August 14, 1924, the Railway Board made an order declaring that "in pursuance of the powers conferred by s. 6 (*c*) of the Railway Act, 1919, the Board has power to make the order applied for." No further order was made, as the appellants had given notice of an appeal to the Supreme Court of Canada.

The Supreme Court gave leave to appeal on certain questions as to the jurisdiction of the Railway Board in the matter.

On May 25, 1925, the Supreme Court (Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting) affirmed the order. The effect of the judgments appears shortly from the judgment of the Judicial Committee, and the appeal is fully reported at [1925] S. C. R. 460.

1927. July 11, 12. *MacRoberts K.C.* (*S.-G. for Scotland*) and *S. B. Woods K.C.* for the appellants; *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Alberta. The appellants' railway was a purely local work constructed and owned by them for their own industrial purposes. It was not within the legislative authority of the Dominion and consequently was not a railway to which, by s. 5 of the Railway Act, 1919, that Act applied. The view of three judges in the Supreme Court that the appellants' line formed part of a railway connecting one Province with another, and was therefore within s. 92, head 10 (*a*), of the British North America Act, 1867, was based upon an erroneous view of the operating agreements. Apart from that, the wording of head 10 (*a*), especially taken in conjunction with sub-heads (*b*) and (*c*), shows that head 10 (*a*) refers only to local works which themselves connect two Provinces at their

boundaries. Joint operation with a Dominion railway does not bring a railway within the sub-head. [Reference was made to *Montreal City* v. *Montreal Street Ry.* (1) and *Toronto Corporation v. Bell Telephone Co.* (2)] The declaration contained in s. 6 (*c*) of the Railway Act, 1919, was not a valid declaration for the purpose of s. 92, head 10 (*c*), of the British North America Act, 1867. Four of the judges in the Supreme Court were of that opinion. A declaration for the purpose of that sub-head must be as to a specific work, either existing or contemplated. Otherwise inconvenience would arise; it might be doubtful whether an undertaking fell within a general declaration of the kind in s. 6 (*a*) of the Act of 1919. There has been no decision of the Privy Council on the question; it was argued in *Hamilton, Grimsby and Bramsville Ry.* v. *Attorney-General for Ontario* (3), and was referred to in the judgment as one of great importance. Further, the Railway Board had not jurisdiction under s. 186 of the Railway Act, 1919, as the appellants' line was not constructed pursuant to s. 185; in any case it had not jurisdiction to grant the application in the form in which it was framed.

O. M. Biggar K.C. and *T. Mathew* for the Attorney-General for Canada, intervener. The appellants' railway was within s. 92, head 10 (*a*), of the British North America Act, 1867, as it formed part of a railway system, all under one control, which connected the Province with another. It is not material that the appellants' branch was not the property of the Dominion Railway. The sub-head should not be read as if the word "directly" appeared before "connecting." The general declaration in s. 6 (*c*) of the Railway Act, 1919, was a valid declaration for the purpose of s. 92, head 10 (*c*), of the British North America Act, 1867. It is convenient and reasonable that all branch lines operated by a Dominion railway should be subject to the powers of the Railway Board. A general declaration such as that in s. 6 (*c*) is now sanctioned by precedent.

S. B. Woods K.C. replied.

(1) [1912] A. C. 333. (2) [1905] A. C. 52.
(3) [1916] 2 A. C. 583, 586.

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July 28. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The appellants, the Luscar Collieries, Ld., are the owners of a short branch line of railway in the Province of Alberta, constructed by them but operated by the Canadian National Railway Company under certain agreements to be mentioned presently. The question in this appeal is whether the appellants' railway is a railway " within the legislative authority of the Parliament of Canada," and therefore a railway to which the Railway Act, 1919, of Canada applies (Railway Act, 1919, s. 5).

The facts giving rise to these questions are as follows :—

In the year 1911 the Grand Trunk Pacific Branch Lines Company, under the authority of an Act of 1909 of the Parliament of Canada, constructed a Coal Branch in the Province from a station on the main line of the Grand Trunk Railway to a point at or near Coalspur. This branch line is now part of the Canadian National Railway.

In the year 1911, by an Act of that year, the Branch Lines Company were authorized by the Parliament of Canada to construct another branch from the branch last mentioned to the Mountain Park Coal Company's collieries.

In the year 1912 the Mountain Park Coal Company, Ld., obtained authority from the Parliament of Alberta to construct, maintain and operate a railway which is either identical with or takes the place of the branch described in the Canadian Act of 1911, and by the same Act of the Parliament of Alberta an agreement set forth in the Schedule to the Act between the Branch Lines Company, the Grand Trunk Company, and the Coal Company was ratified and confirmed, and it was provided that the railway thereby authorized should be operated pursuant to the agreement.

By the said agreement, which is dated January 23, 1912, it was provided in effect that the last mentioned railway should be constructed by and at the expense of the Coal Company, who were to be reimbursed by certain rebates on freight, and that so soon as they had been so reimbursed, the Branch Lines Company were to be the absolute owners

of the railway. Provision was also made for the operation of the railway by the Grand Trunk Company.

In the year 1921 the appellant company, by an Act of the Parliament of Alberta, were authorized to construct the railway in question to connect with the Mountain Park Company's railway and to enter into an agreement for the operation of the railway by the Canadian National Railways which then comprised both the Branch Lines Company and the Grand Trunk Company, and for the ultimate transfer to or acquisition by the Canadian National Railways of the railway.

By an agreement dated May 10, 1921, made between the Branch Lines Company and the Grand Trunk Company, and the Mountain Park Coal Company, supplemental to the agreement of January 23, 1912, provision was made for the application of the agreement to the railway in question, therein referred to as the Luscar Branch Line, with certain modifications as to the terms of reimbursement, and it was thereby provided that on failure of the coal company to ship over the Luscar Branch Line when constructed the annual quantity of coal therein mentioned, neither the Branch Lines Company nor the Grand Trunk Company should be under any obligation to the coal company to continue the operation of such branch line.

Ultimately, by an agreement dated April 2, 1923, and made between the Mountain Park Company of the first part, the appellant company of the second part, the Branch Lines Company of the third part, and the Grand Trunk Company of the fourth part, the appellant company agreed to submit the Luscar Branch to the operation of the agreements of January 23, 1912, and May 10, 1921, and agreed that the Branch Lines Company and the Grand Trunk Company should have as regards the Luscar Branch all the rights given to them by the Mountain Park Company under the said agreements with regard to the Mountain Park Branch.

Since the construction of the Luscar Branch Line it has been operated under the agreements aforesaid by the Canadian National Railways, and traffic over it can pass without

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interruption to such parts of the Dominion as are served by the Canadian National Railways.

Under these circumstances the respondent, N. S. McDonald, the owner of a coal lease in the vicinity of the appellants' colliery, made an application to the Board of Railway Commissioners constituted under the Railway Act of 1919, for an order granting him running rights over the Luscar Branch and for an order requiring the Canadian National Railway Company to grant him permission to construct a short track to serve his coal lease.

The appellant company objected to this application on the ground that the Board of Railway Commissioners for Canada had no jurisdiction, asserting that their line was a Provincial railway, to which the Dominion Railway Acts had no application.

The Board of Railway Commissioners overruled the appellants' objection, and on August 14, 1924, made a formal order declaring that in pursuance of the powers conferred by s. 6 (*c*) of the Railway Act, 1919, the Board had power to make the order applied for. In view of the then pending appeal to the Supreme Court of Canada, the Board made no operative order, leaving this to be dealt with after the question of jurisdiction should have been settled.

The Attorney-General of Canada intervened in the appeal to support the jurisdiction of the Board, and by an order dated May 18, 1925, the Supreme Court affirmed the order of the Board and dismissed the appeal.

The appellant company thereupon obtained special leave to appeal to His Majesty in Council. The Attorney-General for Canada and the Attorney-General for Alberta intervened to oppose and support the appeal respectively. The respondent McDonald does not appear.

The material statutory provisions are the following :—

By s. 91 of the British North America Act, 1867, it was provided that the exclusive legislative authority of the Parliament of Canada extends to (amongst other subjects thereby enumerated) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

Sect. 92, so far as it is material, is as follows: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—. . . . 10. Local works and undertakings other than such as are of the following classes: (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province. (*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

The Railway Act, 1919 (Canada), contains the following material provisions:—

"Section 2 (4.). 'Company' . . . . where not otherwise stated or implied means 'railway company' unless immediately preceded by 'any' 'every' or 'all' in which case it means every kind of company which the context will permit of."

"Section 5. This Act shall, subject as herein provided, apply to all . . . . railways . . . . within the legislative authority of the Parliament of Canada. . . . ."

"Section 6. The provisions of this Act shall without limiting the effect of the last preceding section extend and apply to: . . . . (*c*) Every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned controlled leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada . . . . whether such ownership control or . . . . operation is acquired or exercised by lease agreement or other means whatsoever and whether acquired or exercised under authority of the Parliament of Canada or of the Legislature of any Province or otherwise howsoever; and every railway or portion thereof now or hereafter so owned controlled leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada."

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On this section it is clear that having regard to the definition in s. 2, sub-s. 4, the word " company " means railway company, and does not include a bank or financial company controlling a railway.

The Attorney-General for Canada, in support of the jurisdiction of the Board of Railway Commissioners, relies on two alternative grounds: (1.) That the appellants' railway is, under the circumstances, a railway connecting the Province of Alberta with other Provinces (s. 92, head 10 (*a*)). (2.) That, if this ground fails, then it is a "work" within s. 92, head 10 (*c*), by virtue of s. 6 (*c*), of the Railway Act, 1919, and the declaration therein contained.

Of the judges of the Supreme Court of Canada, three, namely, Anglin C.J. and Duff and Rinfret JJ., decided in favour of the jurisdiction on the first ground, but in reference to the second were of opinion that such a general declaration as that contained in s. 6 (*c*) was not a declaration within s. 92, head 10 (*c*), of the British North America Act, 1867; two, namely, Mignault and Newcombe JJ., accepted the second ground and expressed no opinion on the first. Idington J. was for allowing the appeal.

Their Lordships agree with the opinion of Duff J. that the Mountain Park Railway and the Luscar Branch are, under the circumstances hereinbefore set forth, a part of a continuous system of railways operated together by the Canadian National Railway Company, and connecting the Province of Alberta with other Provinces of the Dominion. It is, in their view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.

In the present case, having regard to the way in which the railway is operated, their Lordships are of opinion that it is in fact a railway connecting the Province of Alberta with others of the Provinces, and therefore falls within

s. 92, head 10 (*a*), of the Act of 1867. There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the Province of Alberta. If under the agreements hereinbefore mentioned the Canadian National Railway Company should cease to operate the Luscar Branch, the question whether under such altered circumstances the railway ceases to be within s. 92, head 10 (*a*), may have to be determined, but that question does not now arise.

Their Lordships having thus come to a conclusion against the appeal on the first of the two grounds mentioned above, it is unnecessary for them to express any opinion on the second, and in accordance with their usual practice they think it not desirable to do so. But they wish it distinctly to be understood that so far as they are concerned the question as to the validity of s. 6 (*c*) of the Act of 1919 is to be treated as absolutely open.

Counsel for the appellant company raised a question as to the power of the Board of Railway Commissioners to grant the application in the form in which it was framed. This is not a matter going to the jurisdiction of the Board—a Dominion authority as distinct from a Provincial one—and is one which can and ought to be considered by the Board when—its general jurisdiction having been established—it is asked to exercise it in the particular case.

Their Lordships are of opinion that the appeal fails and must be dismissed, but without costs. The respondent McDonald does not appear to ask for costs, and the interveners are not entitled to them. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants and for the Attorney-General for Alberta: *Blake & Redden.*

Solicitors for the Attorney-General for the Dominion: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1927 *July* 18.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } Appellant;

AND

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Taxation—Indirect Tax—Fuel-Oil Tax Act (*R. S. B. C.*, 1924, *c.* 251)—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2.

A tax imposed by a Provincial legislature, in respect of a commodity, is an indirect tax, and therefore ultra vires under s. 92, head 2, of the British North America Act, 1867, if from the terms of the Act there appears an expectation and intention that the person required to pay the tax will indemnify himself upon a resale of the commodity taxed, even if in the case under consideration no resales have taken place. The principle of construction laid down in *Attorney-General for Manitoba* v. *Attorney-General for Canada* [1925] A. C. 561, following earlier decisions, does not depend upon the special circumstances of individual cases.

Accordingly, an Act of the legislature of British Columbia requiring that every person who shall purchase within the Province fuel-oil for the first time after its manufacture in, or importation into, the Province, is invalid under s. 92, head 2; it was not necessary to decide whether it was ultra vires also as relating to excise.

Judgment of the Supreme Court of Canada [1927] S. C. R. 460 affirmed.

Appeal (No. 65 of 1927) by special leave from a judgment of the Supreme Court of Canada (February 1, 1927) affirming a judgment of the Court of Appeal of British Columbia (June 14, 1926), which affirmed a judgment upon the trial of an action.

The action was brought in the Supreme Court of British Columbia by the appellant against the respondent company, who were purchasers and consumers of fuel-oil in the Province, for an account and to recover tax claimed to be due under s. 6 of the Fuel-Oil Tax Act (R. S. B. C., 1924, c. 251), which was first enacted as c. 71 of the Statutes of the Province for 1923.

* *Present:* Viscount Haldane, Lord Atkinson, Lord Blanesburgh, Lord Darling, and Lord Warrington of Clyffe.

The question involved in the appeal was whether the above Act was ultra vires under the British North America Act, 1867.

The provisions of the Act in question, and the facts of the case, sufficiently appear from the judgment of the Judicial Committee. The evidence at the trial showed that the respondents purchased the fuel-oil for consumption, and did not resell it; also that as a general rule there was no buying of fuel-oil in British Columbia for resale, resale having taken place in only two or three isolated cases by the Union Steamship Company.

The trial judge, Morrison J., dismissed the action on the ground that the Act was ultra vires under s. 92, head 2, of the British North America Act, 1867. The judgment was affirmed by a majority upon an appeal to the Court of Appeal of British Columbia, whose decision was affirmed by the Supreme Court of Canada (Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting). The appeal to the Supreme Court is reported at [1927] S. C. R. 84.

1927. July 1, 4. *J. W. de B. Farris K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant. The tax is a direct tax and consequently valid under s. 92, head 2, of the British North America Act, 1867. In applying the test laid down in decisions of the Privy Council regard must be had to the actual operation of the tax, which must be taken to have been known to the legislature. The evidence shows that the appellants bought entirely for their own consumption; it does not appear that other purchasers had effected resales, except in two or three isolated cases, which arose in exceptional circumstances and were not shown to have been at prices including the tax. If the tax was a direct tax, it is not material to consider whether in one aspect it is excise.

[Reference was made to *Attorney-General for Quebec* v. *Reed* (1); *Bank of Toronto* v. *Lambe* (2); *Brewers' and Maltsters' Association* v. *Attorney-General for Toronto* (3); *Cotton* v. *The*

(1) (1884) 10 App. Cas. 141, 143, 144.
(2) (1887) 12 App. Cas. 575, 581–583.
(3) [1897] A. C. 231, 236.

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King (1); and *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (2)]

E. P. Davis K.C., *Tilley K.C.* and *J. E. McMullen* for the respondents were not called upon.

July 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada dismissing an appeal brought to it from the Court of Appeal of British Columbia, which in its turn dismissed an appeal from a judgment of Morrison J.

The question which has been decided is concerned with the validity of the British Columbia Fuel-Oil Tax, 1923, and especially with s. 3 and s. 6 of that Act. It is contended for the respondents that under s. 92 of the British North America Act there was no power in the Provincial Legislature to pass the statute, the ground being that the taxation attempted is not " direct."

The purpose was to enact that every person who purchases within the Province fuel-oil sold for the first time after its manufacture in or importation into the Province should pay for Provincial purposes a tax equal to one-half cent. per gallon on the oil so purchased. By the definition clause " purchaser " is to mean " any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." " Vendor " is to mean " any person who within the Province sells fuel-oil for the first time after its manufacture in or importation into the Province." By s. 3 the purchaser is to pay the tax as so defined. By s. 4 the vendor, on the sale to the purchaser, is to levy and collect and pay it over to the Government. By s. 6 every person who has in his possession for use or consumption fuel-oil on which the tax has not been paid is to pay it. The rest of the Act forbids the use of fuel-oil unless the tax has been paid, makes an exception from liability to the tax for fuel-oil used in the operation of vessels plying between ports in the Province and ports outside the Dominion; and imposes penalties.

(1) [1914] A. C. 176, 190–195. (2) [1925] A. C. 561.

The first and cardinal question is whether the tax is direct or indirect within the meaning of the expressions used in ss. 91 and 92 of the British North America Act. If the tax is indirect, the respondents escape wholly. Their Lordships entertain no doubt that within the meaning placed on the language employed by a series of decisions in the Canadian Courts and in the Privy Council, the tax is indirect. If so, the statute in question was ultra vires.

In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) the Board held invalid an Act of Manitoba to impose a tax on persons selling grain for future delivery, notwithstanding that the Act declared in terms that the tax was a direct one. There was in that case an agreed statement that the ultimate price of the grain, which was called a " world price," was fixed, was but little controlled by the producers, and had to be looked to as covering all the items in cost of production and transportation.

It was laid down by the Board that while a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied, as in that case the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *Attorney-General for Quebec* v. *Reed* (2), per Lord Selborne; *Bank of Toronto* v. *Lambe* (3), per Lord Hobhouse; and *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (4), per Lord Herschell. It was true that the question of the meaning of the words used in ss. 91 and 92 was one, not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation must have contemplated some

(1) [1925] A. C. 561.
(2) 10 App. Cas. 141.
(3) 12 App. Cas. 575.
(4) [1897] A. C. 231.

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tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to these tendencies. The definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious indicia of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

Taking the principle so laid down as the guide to the solution of the present question, the result does not seem doubtful. There are two fuel-oil companies which are associated in business in a close fashion. The Union Oil Company of California sells its oil to the Union Company of Canada, which has large storage tanks at Vancouver, which the former company keeps replenished according to directions from the Canadian Company. The respondents purchase oil in British Columbia from the latter company. It is sought to tax them as first purchasers under s. 3, and as holders of the oil for consumption under s. 6, which has to be read with reference to s. 3. It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one.

Other points were argued against the validity of the Act in question, as, for instance, that it contravened the special provisions of the Britsh North America Act in reference to excise. On these points their Lordships abstain from expressing an opinion. The conclusion at which they have arrived renders it unnecessary to discuss them, and, in accordance with their practice, they accordingly avoid doing so.

Their Lordships agree with the conclusion arrived at by all the Courts below, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Gard, Lyell & Co.*
Solicitors for respondents: *Blake & Redden.*

END OF VOL. AND OF APPELLATE SERIES FOR 1927.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1927, ill be as follows :—

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